SCHEDULE A—COMPUTATION SCHEDULE [illegible] DISTRICT TAXES AND USE TAX

PLEASE READ INSTRUCTIONS BEFORE PREPARING THIS SCHEDULE. REVERSE CARBON BEFORE MAKING ENTRIES

This schedule is to be completed for District Sales [illegible] (1) you are engaged in business in a transit district imposing such taxes and, or (2) you are engaged in business in a transit district and are required to collect the [illegible] sales or storage or use tax subject to the district use tax.

A1 Amount on which LOCAL Tax applies (Enter amount from Line 16 on the reverse side) $

A2 DEDUCT—Amount of sales made from locations outside transit districts and delivered to a point not in a transit district $

A3 Amount of transit district transactions (Line A1 minus Line A2) $

* San Francisco Bay Area Rapid Transit District

** Santa Clara County imposes both a ½% Traffic Authority tax and a ½% Transit District Tax for a total of 1% Transactions Taxes and Use Tax

ALLOCATE TOTAL ON LINE A3 TO PROPER TRANSIT DISTRICT(S) ON LINE A4

	DISTRICT						
	BART* (In the counties of Contra Costa and San Francisco Counties)	MARTA (In Fulton County)	SANTA CLARA COUNTY ** TRAFFIC AUTHORITY a	SANTA CLARA COUNTY ** TRANSIT DISTRICT a	SANTA CRUZ COUNTY a	LOS ANGELES COUNTY	
A4 Enter amount from Line A3 allocated to the proper transit districts							
A5 ADD—Other DISTRICT Tax adjustments (See instruction A5)							
A6 TOTAL (Line A4 plus Line A5)							
DEDUCT EXEMPT TRANSACTIONS See instruction A7							
A7 Sales of property shipped to a point outside the district for use elsewhere in California							
A8 Sales made under a fixed price contract or a fixed price lease executed prior to the effective date of the DISTRICT Tax							
A9 Other exempt transactions or adjustments							
A10 Total Transactions Exempt from the DISTRICT Tax (Lines A7 through A9)							
A11 Amount on which the DISTRICT Tax applies (Line A6 minus Line A10)							
A12 Amount of ½% DISTRICT Tax (Multiply amount on Line A11 by .005)							
A13 Amount of ½% Tax paid to other Districts (See instruction A13)							
A14 TOTAL TRAFFIC AUTHORITY TRANSIT DISTRICT TAX (Line A12 minus Line A13)							

On reverse side enter on line from Line A14, above on Line 18 Block a(BART) b(MCT) c(CCTA) d(SCCT) e(SCMT) f(LACT)

SCHEDULE B—DETAILED ALLOCATION BY COUNTY OF 1% UNIFORM LOCAL SALES AND USE TAX

PLEASE READ INSTRUCTIONS BEFORE PREPARING THIS SCHEDULE. REVERSE CARBON BEFORE MAKING ENTRIES.

The 1% uniform local sales and use tax on retail sales of merchandise (not involving installation, made at your permanent place of business in California or local use tax on property shipped to this state from outside California and used at this place of business, should be entered on Line B2 below the county schedule. Enter the local tax on all other transactions in Column C of the schedule after the name of the county where the sale or use occurred.

A COUNTY OF TRANSACTION	B CODE	C AMOUNT OF 1% LOCAL TAX	A COUNTY OF TRANSACTION	B CODE	C AMOUNT OF 1% LOCAL TAX	A COUNTY OF TRANSACTION	B CODE	C AMOUNT OF 1% LOCAL TAX	A COUNTY OF TRANSACTION	B CODE	C AMOUNT OF 1% LOCAL TAX
ALAMEDA	01		KINGS	16		PLACER	31		SIERRA	46	
ALPINE	02		LAKE	17		PLUMAS	32		SISKIYOU	47	
AMADOR	03		LASSEN	18		RIVERSIDE	33		SOLANO	48	
BUTTE	04		LOS ANGELES	19		SACRAMENTO	34		SONOMA	49	
CALAVERAS	05		MADERA	20		SAN BENITO	35		STANISLAUS	50	
COLUSA	06		MARIN	21		SAN BERNARDINO	36		SUTTER	51	
CONTRA COSTA	07		MARIPOSA	22		SAN DIEGO	37		TEHAMA	52	
DEL NORTE	08		MENDOCINO	23		SAN FRANCISCO	38		TRINITY	53	
EL DORADO	09		MERCED	24		SAN JOAQUIN	39		TULARE	54	
FRESNO	10		MODOC	25		SAN LUIS OBISPO	40		TUOLUMNE	55	
GLENN	11		MONO	26		SAN MATEO	41		VENTURA	56	
HUMBOLDT	12		MONTEREY	27		SANTA BARBARA	42		YOLO	57	
IMPERIAL	13		NAPA	28		SANTA CLARA	43		YUBA	58	
INYO	14		NEVADA	29		SANTA CRUZ	44				
KERN	15		ORANGE	30		SHASTA	45				

B1 Total local tax for all counties listed above $

B2 Local tax on sales made and merchandise consumed at your permanent place of business in California. (Do not include any tax allocated to the above counties) Tax Area Code Board Use Only $

B3. Total local tax liability (Line B1 plus Line B2) This total tax must agree with Line 17 on the reverse side. $

BT-401-ACJ BACK REV. 19 (1-86)

BEST AVAILABLE COPY

* * *

[TESTIMONY OF WALTER SHAFFER]

[212] Q MR. SHAFFER, WAS, DURING THE PERIOD IN ISSUE, AND IS A STANDARD OPERATING PROCEDURE OF THE STATE BOARD OF EQUALIZATION TO ALLOCATE MAIL-ORDER SALES FROM OUT OF STATE FOR BRADLEY BURNS' LOCAL SALES AND USE TAX PURPOSES BY FORMULA AND NOT REQUIRED SEGREGATION BY THE SELLER AS TO EACH LOCAL TAX UNIT?

A YES, THAT'S THE CASE.

Q IS IT ALSO THE BOARD'S, AND WAS IT DURING THE PERIOD IN ISSUE THE BOARD'S PRACTICE TO APPROVE IN ADVANCE AT THE REQUEST OF TAXPAYER'S [sic] SUMMARY METHODS OF REPORTING FOR SALES AND USE TAX PURPOSES INCLUDING LOCAL, TO AVOID THE BURDENSOME RECORD-KEEPING AND ACCOUNTING PRACTICES?

A YES, WE HAVE THAT POLICY.

MR. GOBAR: NO FURTHER QUESTIONS.

THE COURT: YOU MAY CROSS-EXAMINE.

CROSS-EXAMINATION

BY MR. GORE:

Q MR. SHAFFER, AS TO THESE POLICIES, WHICH YOU'VE DESCRIBED OF TAKING SOMETHING OTHER THAN REGULATIONS AND STATUTES REQUIRE AT THE DISCRETION OF THE BOARD?

[213] A WELL, I'M NOT CERTAIN I UNDERSTAND THE QUESTION.

THE COURT: WHICH CATEGORY ARE YOU REFERRING TO, MR. TREEBY?

BY MR. TREEBY:

Q THE LAST QUESTION, THE LAST QUESTION THAT YOU ANSWERED INDICATED THAT THERE WERE CERTAIN CIRCUMSTANCES IN WHICH YOU WOULD ACCEPT LESS THAN WHAT THE STATUTES AND REGULATIONS REQUIRE BY AGREEMENT OF THE BOARD.

I SIMPLY ASKED, IS THAT AT THE DISCRETION OF THE BOARD?

A YES, IT IS. YES, THE BOARD – THE BOARD'S POLICY IS TO WORK WITH TAXPAYERS TO ELIMINATE PROBLEMS WHERE THEY BECOME REAL BURDENSOME.

Q BUT THAT IS TOTALLY AT THE DISCRETION OF THE BOARD; IS IT NOT?

A THAT'S TRUE.

Q THERE'S NO STATUTORY OR REGULATORY REQUIREMENT THAT THE BOARD MAKE ANY SUCH ARRANGEMENTS?

A THAT'S PROBABLY TRUE, ALTHOUGH THERE IS A REGULATION THAT PROVIDES FOR SOMETHING LIKE THAT FOR A PARTICULAR INDUSTRY.

Q WHAT PARTICULAR INDUSTRY?

A IT'S THE GROCERY INDUSTRY.

* * *

Exh. 53

GUINN, SMITH & CO.
A PROFESSIONAL CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS
3406 TEXAS DRIVE
IRVING, TEXAS 75062

(214) 255-7120

1980 Financial Statement

To the Board of Directors

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
Baton Rouge, Lousiana:

We have examined the balance sheet of JIMMY SWAGGART EVANGELISTIC ASSOCIATION (a Louisiana non-profit corporation) as of December 31, 1980 and 1979, and the related statements of revenue, expenses and excess of assets over liabilities and changes in financial position for the years then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. It was not practicable to extend tests of contributions received beyond the Association's accounting for such receipts.

In our opinion, the accompanying financial statements present fairly the financial position of JIMMY SWAGGART EVANGELISTIC ASSOCIATION as of December 31, 1980 and 1979, and the results of operations and changes in financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

/s/ Guinn, Smith & Co.
Irving, Texas
June 30, 1981

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
BALANCE SHEET – DECEMBER 31, 1980 AND 1979

ASSETS

	1980	*1979*
CURRENT ASSETS:		
Cash	$ 211,288	$ 182,298
Accounts receivable, net of reserve for doubtful accounts of $200,000 and $175,000 (Note 1)	527,123	463,423
Inventories (Note 1)	1,720,326	1,474,424
Prepaid expenses	60,664	11,512
Total current assets	2,519,401	2,131,657
NOTES RECEIVABLE (Note 4)	430,430	128,095
RADIO STATION LICENSES, net of amortization (Note 1)	4,806,265	4,935,856
PROPERTY, BUILDINGS AND EQUIPMENT, at cost (Note 1)		
Land	5,082,233	4,877,112
Buildings	1,753,768	1,615,884
Furniture, fixtures and equipment	7,842,772	4,539,087
Construction in process	149,757	–0–
	14,828,530	11,032,083
Less – allowance for depreciation	2,343,951	1,444,424
	12,484,579	9,587,659
OTHER ASSETS	860,975	418,441
Total	$ 21,101,650	$ 17,201,708

LIABILITIES AND EXCESS OF ASSETS OVER LIABILITIES

	1980	*1979*
CURRENT LIABILITIES:		
Bank overdraft	$ 773,260	$ -0-
Short-term debt (Note 5)	2,012,968	3,152,175
Current portion of long-term debt (Note 2)	132,053	807,183
Accounts payable	4,556,349	4,101,541
Accrued liabilities	647,966	156,039
Other current liabilities	–0–	251,934
Total current liabilities	8,122,596	8,468,872
LONG-TERM DEBT, less current portion (Note 2)	247,222	885,718
OTHER LIABILITIES	325,728	156,685
COMMITMENTS (Note 3)	–0–	–0–
EXCESS OF ASSETS OVER LIABILITIES	$ 12,406,104	$ 7,690,433
Total	$ 21,101,650	$ 17,201,708

The accompanying notes are an integral part of these statements

JIMMY SWAGGART EVANGELISTIC ASSOCIATION

STATEMENT OF REVENUE AND EXPENSES AND CHANGES IN EXCESS OF ASSETS OVER LIABILITIES FOR THE YEARS ENDED DECEMBER 31, 1980 AND 1979

	1980	*1979*
REVENUE:		
Contributions and sales of religious materials	$ 29,833,936	$ 18,927,016
Sales – radio broadcast time	2,048,025	1,613,834
	31,881,961	20,540,850
OPERATING EXPENSES:		
Radio and television evangelism	11,637,896	8,166,241
Religious materials	2,786,689	2,333,256
Salaries and wages	3,475,877	2,485,873
Printing, postage and shipping	4,206,993	2,109,028
Missions outreach	469,740	426,434
General, administrative and other	3,851,081	3,522,401
	26,428,276	19,043,233
Excess of revenue over operating expenses	5,453,685	1,497,617
OTHER (REVENUE) EXPENSES:		
Depreciation and amortization (Note 1)	1,080,703	674,653
Interest, net	375,125	453,792
Other, net	(705,366)	1,901
	750,462	1,130,346
EXCESS OF REVENUE OVER EXPENSES (Note 6)	4,703,223	367,271

EXCESS OF ASSETS OVER LIABILITIES, beginning of year	7,690,433	7,329,596
EFFECT OF CURRENCY TRANSLATION, foreign operations	12,448	(6,434)
EXCESS OF ASSETS OVER LIABILITIES, end of year	$ 12,406,104	$ 7,690,433

The accompanying notes are an integral part of these statements.

JIMMY SWAGGART EVANGELISTIC ASSOCIATION

STATEMENT OF CHANGES IN FINANCIAL POSITION FOR THE YEARS ENDED DECEMBER 31, 1980 AND 1979

	1980	*1979*
FINANCIAL RESOURCES WERE PROVIDED BY:		
Excess of revenue over expenses	$ 4,703,223	$ 367,271
Add charges not affecting working capital:		
Depreciation and amortization	1,080,703	674,653
Loss on sale of assets	–0–	62,981
Effect of currency translation	12,448	–0–
	5,796,374	1,104,905
Less credits not affecting working capital:		
Gain on sale of assets	721,412	–0–
Effect of currency translation	–0–	6,434
	5,074,962	1,098,471
Increase in long-term debt	–0–	443,120
Increase in other liabilities	169,044	156,685

Decrease in notes receivable	–0–	16,752
Proceeds from sale of assets	1,914,848	613,314
Total resources provided	7,158,854	2,328,342
FINANCIAL RESOURCES WERE USED FOR:		
Increase in notes receivable	302,335	–0–
Purchases of buildings, equipment and land	5,041,469	5,619,674
Reduction of long-term debt	638,496	–0–
Purchase of radio station licenses	–0–	1,869,999
Increase in other assets	442,534	411,705
Total resources used	6,424,834	7,901,378
Increase (decrease) in working capital	$ 734,020	$ (5,573,036)
CHANGES IN WORKING CAPITAL:		
Increase (decrease) in current assets:		
Cash	$ 28,990	$ 120,396
Short-term investments	–0–	(1,191,722)
Accounts receivable	63,700	22,086
Inventories	245,902	937,357
Prepaid expenses	49,152	(32,529)
	387,744	(144,412)
(Increase) decrease in current liabilities:		
Bank overdraft	(773,260)	123,840
Current portion of long-term debt	675,130	(743,895)
Short-term debt	1,139,207	(1,952,175)
Accounts payable	(454,808)	(2,578,283)
Accrued liabilities	(491,927)	(26,177)
Other current liabilities	251,934	(251,934)
	346,276	(5,428,624)

Increase (decrease) in working capital	$ 734,020	$ (5,573,036)

The accompanying notes are an integral part of these statements

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
NOTES TO FINANCIAL STATEMENTS

(1) SUMMARY OF ACCOUNTING POLICIES

Principles of Consolidation

The financial statements include the accounts of all foreign subsidiary organizations. Significant intercompany balances and transactions have been eliminated.

Inventories

Inventories are stated at the lower of cost (determined on a first-in, first-out basis) or market.

Property and Depreciation

The Association provided for depreciation of buildings and improvements, furniture and equipment on the straight-line method. The estimated useful lives of the assets are as follows:

Buildings	25 - 30 years
Equipment	3 - 10 years
Furniture	3 - 10 years

Radio Station Licenses

Radio station license costs are the excess of cost over fair market value of assets acquired on the dates of acquisition, plus related legal expenses. These costs are amortized over a 40 year period.

Federal Income Taxes

The Association is classified as a tax exempt organization under the Internal Revenue Code 501(c)(3), and accordingly no provision for Federal Income Taxes is required.

Pledges

Accounts receivable balances at December 31, 1980 and 1979 do not include pledges from ministry partners, as the Association does not treat such pledges as contracts.

(2) LONG-TERM DEBT

A summary of long-term debt outstanding at December 31, 1980 and December 31, 1979, is set forth below:

	1980		1979	
	Current Portion	Long-Term Portion	Current Portion	Long-Term Portion
Non-Interest bearing note payable to an individual secured by property of Radio Station KWJS payable monthly beginning January 4, 1980 through 1981	$ 6,000	$ –0–	$ 6,000	$ 6,000
10% note payable to a corporation secured by transportation equipment payable monthly through 1982	7,621	2,133	–0–	–0–
10% note payable to a partnership secured by 53.68 acres of land payable semiannually through 1981	–0–	–0–	781,000	781,000
7% note payable to an individual secured by property of Radio Station KWJS payable monthly through 1985	21,642	77,225	20,183	98,718
10% note payable to a corporation secured by video equipment payable through 1983	43,236	61,252	–0–	–0–
17 1/2% note payable to a savings association interest only, principal portion due November 1982	–0–	16,500	–0–	–0–

	1980		1979	
	Current Portion	Long-Term Portion	Current Portion	Long-Term Portion
8% add on note payable to a corporation secured by video equipment payable through 1984	12,423	28,987	–0–	–0–
7% add on note payable to a corporation secured by video equipment payable through 1983	31,050	56,925	–0–	–0–
6% add on note payable to a corporation secured by video equipment payable through 1982	10,080	4,200	–0–	–0–
	$ 132,052	$ 247,222	$ 807,183	$ 885,718

(3) COMMITMENTS

The Association had the following commitments as of December 31, 1980:

Commitment Type	Number of Months Remaining	Amount
News services	36 - 41	$ 52,632
Facility leases	1 - 66	22,090
	Total commitments	$ 74,722

(4) NOTES RECEIVABLE

Included in notes receivable at December 31, 1980 is $192,790 and at December 31, 1979 is $57,321 due from directors of the Association. This is an interest bearing obligation for purchase of parsonages.

(5) SUBSEQUENT EVENTS

Subsequent to December 31, 1980 the Association entered into a contract for $4,914,200 for construction of new office facilities.

Subsequent to December 31, 1980 the Association has reduced short-term debt by $2,012,968.

(6) EXCESS OF REVENUE OVER EXPENSES

The current year's excess of revenue over expenses was used for the purchase of land, buildings and equipment, and other capital expenditures as outlined in the Statement of Changes in Financial Position.

Exh. 54

GUINN, SMITH & CO.
A PROFESSIONAL CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS
3406 TEXAS DRIVE
IRVING, TEXAS 75062

(214) 255-7120

1981 Financial Statement

To the Board of Directors

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
Baton Rouge, Lousiana:

We have examined the balance sheet of JIMMY SWAGGART EVANGELISTIC ASSOCIATION (a Louisiana non-profit corporation) as of December 31, 1981 and 1980, and the related statements of revenue, expenses and excess of assets over liabilities and changes in financial position for the years then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. It was not practicable to extend tests of contributions received beyond the Association's accounting for such receipts.

In our opinion, the accompanying financial statements present fairly the financial position of JIMMY SWAGGART EVANGELISTIC ASSOCIATION as of December 31, 1981 and 1980, and the results of operations and changes in financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

/s/ Guinn, Smith & Co.
Irving, Texas
February 23, 1982

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
BALANCE SHEET – DECEMBER 31, 1981 AND 1980

ASSETS

	1981	*1980*
CURRENT ASSETS:		
Cash	$ 340,125	$ 211,200
Short-term investments, at cost	3,100,000	–0–
Current portion of notes receivables	55,618	–0–
Accounts receivable, net of reserve for doubtful accounts of $207,405 and $200,000 (Note 1)	439,941	527,123
Inventories	1,492,898	1,720,326
Prepaid expenses	45,261	60,664
Total current assets	5,473,843	2,519,401
NOTES RECEIVABLE (Note 4)	630,224	430,430
RADIO STATION LICENSES, net of amortization (Note 1)	4,676,674	4,806,265
PROPERTY, BUILDINGS AND EQUIPMENT, at cost (Note 1)		
Land	5,075,309	5,082,233
Buildings	2,759,350	1,753,768
Furniture, fixtures and equipment	9,366,660	7,842,772
Construction in process	2,723,549	149,757
	19,924,868	14,828,530
Less – allowance for depreciation	3,704,365	2,343,951
	16,220,503	12,484,579
OTHER ASSETS	874,387	860,975
Total	$ 27,875,631	$ 21,101,650

LIABILITIES AND EXCESS OF ASSETS OVER LIABILITIES

	1981	*1980*
CURRENT LIABILITIES:		
Bank overdraft	$ -0-	$ 773,260
Short-term debt (Note 5)	-0-	2,012,968
Current portion of long-term debt (Note-2)	131,072	132,053
Accounts payable	4,262,917	4,556,349
Accrued liabilities	1,077,653	647,966
Deferred revenue (Note 6)	1,770,669	–0–
Total current liabilities	7,242,311	8,122,596
LONG-TERM DEBT, less current portion (Note 2)	212,384	247,222
OTHER LIABILITIES	342,987	325,726
COMMITMENTS (Note 3)	–0–	–0–
EXCESS OF ASSETS OVER LIABILITIES	20,077,949	12,406,104
Total	$ 27,875,631	$ 21,101,650

The accompanying notes are an integral part of these statements

JIMMY SWAGGART EVANGELISTIC ASSOCIATION

STATEMENT OF REVENUE AND EXPENSES AND CHANGES IN EXCESS OF ASSETS OVER LIABILITIES FOR THE YEARS ENDED DECEMBER 31, 1981 AND 1980

	1981	*1980*
REVENUE:		
Contributions and sales of religious materials	$ 42,673,460	$ 29,833,936
Sales – radio broadcast time	2,194,162	2,048,025
	44,867,622	31,881,961
OPERATING EXPENSES:		
Radio and television evangelism	13,342,703	11,637,896
Religious materials	2,446,414	2,786,689
Salaries and wages	4,890,876	3,475,877
Printing, postage and shipping	6,841,021	4,206,993
Missions outreach	1,246,865	469,740
General, administration and other	7,055,123	3,851,081
	35,823,002	26,428,276
Excess of revenue over operating expenses	9,044,620	5,453,685
OTHER (REVENUE) EXPENSES:		
Depreciation and amortization (Note 1)	1,596,926	1,080,703
Interest, net	(15,709)	375,125
Other, net	(204,123)	(705,366)
	1,377,094	750,462
EXCESS OF REVENUE OVER EXPENSES (Note 7)	7,667,526	4,703,223

EXCESS OF ASSETS OVER LIABILITIES, beginning of year	12,406,104	7,690,433
EFFECT OF CURRENCY TRANSLATION, foreign operations	4,319	12,448
EXCESS OF ASSETS OVER LIABILITIES, end of year	$ 20,077,949	$ 12,406,104

The accompanying notes are an integral part of these statements

JIMMY SWAGGART EVANGELISTIC ASSOCIATION

STATEMENT OF CHANGES IN FINANCIAL POSITION FOR THE YEARS ENDED DECEMBER 31, 1981 AND 1980

	1981	*1980*
FINANCIAL RESOURCES WERE PROVIDED BY:		
Excess of revenue over expenses	$ 7,667,526	$ 4,703,223
Add charges not affecting working capital:		
Depreciation and amortization	1,596,925	1,080,703
Effect of currency translation	4,319	12,448
	9,268,770	5,796,374
Less credits not affecting working capital:		
Gain on sale of assets	89,499	721,412
	9,179,271	5,074,962
Increase in other liabilities	17,258	169,044
Proceeds from sale of assets	136,000	1,914,848
Total resources provided	9,332,529	7,158,854

FINANCIAL RESOURCES WERE USED FOR:		
Increase in notes receivable	199,794	302,335
Purchases of buildings, equipment, land	5,249,758	5,041,469
Reduction of long-term debt	34,838	638,496
Increase in other assets	13,412	442,534
Total resources used	5,497,802	6,424,834
Increase (decrease) in working capital	$ 3,834,727	$ 734,020
CHANGES IN WORKING CAPITAL:		
Increase (decrease) in current assets:		
Cash	$ 128,837	$ 28,990
Short-term investments	3,100,000	–0–
Current Portion-notes receivable	55,618	–0–
Accounts receivable	(87,182)	63,700
Inventories	(227,428)	245,902
Prepaid expenses	(15,403)	49,152
	2,954,442	387,744
(Increase) decrease in current liabilities:		
Bank overdraft	773,260	(773,260)
Current portion of long-term debt	981	675,130
Short-term debt	2,012,968	1,139,207
Accounts payable	293,432	(454,808)
Accrued liabilities	(429,687)	(491,927)
Deferred revenue	(1,770,669)	251,934
	880,285	346,276
Increase (decrease) in working capital	$ 3,834,727	$ 734,020

The accompanying notes are an integral part of these statements

JIMMY SWAGGART EVANGELISTIC ASSOCIATION
NOTES TO FINANCIAL STATEMENTS

(1) SUMMARY OF ACCOUNTING POLICIES

Principles of Consolidation

The financial statements include the accounts of all foreign subsidiary organizations. Significant intercompany balances and transactions have been eliminated.

Inventories

Inventories are stated at the lower of cost (determined on a first-in, first-out basis) or market.

Property and Depreciation

The Association provided for depreciation of buildings and improvements, furniture and equipment on the straight-line method. The estimated useful lives of the assets are as follows:

Buildings	25 - 30 years
Equipment	3 - 10 years
Furniture	3 - 10 years

Radio Station Licenses

Radio station license costs are the excess of cost over fair market value of assets acquired on the dates of acquisition, plus related legal expenses. These costs are amortized over a 40 year period.

Federal Income Taxes

The Association is classified as a tax exempt organization under the Internal Revenue Code 501(c)(3), and accordingly no provision for Federal Income Taxes is required.

Pledges

Accounts receivable balances at December 31, 1981 and 1980 do not include pledges from ministry partners, as the Association does not treat such pledges as contracts.

(2) LONG-TERM DEBT

A summary of long-term debt outstanding at December 31, 1981 and December 31, 1980, is set forth below:

	1981		1980	
	Current Portion	Long-Term Portion	Current Portion	Long-Term Portion
Non-Interest bearing note payable to an individual secured by property of Radio Station KWJS payable monthly beginning January 4, 1980 through 1981	$ –0–	$ –0–	$ 6,000	$ –0–
10% note payable to a corporation secured by transportation equipment payable monthly through 1982	3,112	$ –0–	7,621	$ 2,133
13% note payable to a bank secured by land payable monthly through 1987	10,300	83,826	–0–	–0–
7% note payable to an individual secured by property of Radio Station KWJS payable monthly through 1985	23,206	53,237	21,642	77,225
10% note payable to a corporation secured by video equipment payable through 1983	43,236	10,015	43,236	61,252
17½% note payable to a savings association interest only, principal portion due November 1982	–0–	14,066	–0–	16,500

	1981		1980	
	Current Portion	Long-Term Portion	Current Portion	Long-Term Portion
8% add on note payable to a corporation secured by video equipment payable through 1984	11,387	16,565	12,423	28,987
7% add on note payable to a corporation secured by video equipment through 1983	28,463	25,875	31,050	56,925
6% add on note payable to a corporation secured by video equipment payable through 1982	3,360	–0–	10,080	4,200
	$ 131,072	$ 212,384	$ 132,052	$ 247,222

(3) COMMITMENTS

Long-term Lease Commitments:

The Association had the following lease commitments as of December 31, 1981:

	Aggregate Minimum Rentals (all Non-Capitalized Leases)		
	Radio Stations	*Buildings*	*Total*
1982	42,948	21,600	64,548
1983	42,948	12,600	55,548
1984	19,506	–	19,506
1985	1,760	–	1,760
1986	380	–	380
	107,542	34,200	141,742

Commitments and Contingencies:

The Association has entered into lease agreements which are contingent upon delivery by May 1, 1982. These leases are for computer hardware, software and maintenance agreements and the minimum aggregate rentals are as follows:

1982	$ 237,160
1983	404,607
1984	342,562
1985	124,755
	$1,109,184

The Association has entered into contracts for Data Processing facilities management and management consulting. The contract for the data processing facilities management requires payment of $1,446,546 in 1982 and $602,690 in 1983. The management consulting contract can be rescinded by either party with a 90 day written notice. The

yearly commitment for 1982 is $150,000 with subsequent years valued at $144,000.

(4) NOTES RECEIVABLE

Included in notes receivable at December 31, 1981 is $342,133 and at December 31, 1980 is $192,790 due from directors of the Association. This is an interest bearing obligation for purchase of parsonages.

(5) SUBSEQUENT EVENTS

On February 15, 1982 the Association purchased 36.377 acres of land for $750,000. The $750,000 was provided by a short-term bank loan.

The Association sold Radio Station KWKI for $3,100,000 cash on March 1, 1982.

(6) DEFERRED REVENUE

Deferred revenue consists of payments received in 1981 for religious materials not shipped until 1982. Deferred revenue is recognized in the period in which the corresponding materials are shipped.

(7) EXCESS OF REVENUE OVER EXPENSES

The current year's excess of revenue over expenses was used for the purchase of land, buildings and equipment, and other capital expenditures as outlined in the Statement of Changes in Financial Position.

Exh. 55

[7] *INTERROGATORY NO. 14:*

". . . ."

"3. What percentage of sales were a) bibles; b) sermon booklets; c) bible study manuals and component parts ('study manuals'); d) gospel piano/organ courses; e) other books; f) audio recorded music; g) audio recorded sermons; or h) other tangible personal property (identify and describe)?"

ANSWER TO INTERROGATORY NO. 14:

". . . . As to part three, the following response is submitted. JSM's records do not provide a breakdown of distribution by item for California. . . . Attached is a summary of national distributions by class of merchandise that encompasses the period from 1979 through mid-1982. From these figures one could estimate the amount of distribution in California by item. The estimate would be done in the following manner. First, it would be necessary to determine what percent of the total national distributions the California distributions constitute. This percentage figure would then be applied to each item. This is the best and only available method of determining distributions by item in California."

MERCH SALES ENDING MID 1982 10/16/84 14:40 PAGE

	-- ENDING MID 82 --		-- PRIOR TO 1982 --		ALL TIME END MID-82	
LRA	COUNT	DOLLAR	COUNT	DOLLAR	COUNT	DOLLAR
ALBUMS	56,719	$531,678	314,352	$2,487,778	371,071	$3,019,456
TAPES	157,983	$1,025,754	506,806	$3,177,226	664,789	$4,202,980
BOOKS	155,612	$1,051,556	238,611	$2,844,963	394,223	$3,896,519
OTHER	84,995	$1,064,987	380,129	$6,987,577	465,124	$8,052,564
	455,309	$3,673,975	1,239,898	$15,497,544	1,895,207	$19,171,519

National Figures – Begin 1979

Attachment To
Interrogatory 14
Supplemental Answer

[8] *INTERROGATORY NO. 15*

"With respect to crusade merchandise sales . . . .

"A. describe in detail . . . ."

"3. How prices set, notice to customers of prices, tax reimbursement, payment terms; authority to reduce prices or give away merchandise (and extent to which and by whom such authority was exercised;"

ANSWER TO INTERROGATORY NO. 15

* * *

[9] Factors considered in determining the price are the cost of the item, and the prices of similar items in the marketplace. . . ."

* * *

". . . . Combination prices generally were set by Donnie Swaggart with virtually every crusade featuring increasingly cheaper prices for quantity purchases. In deciding what prices to reduce, he would consider the demand for particular items.

* * *

According to Donnie Swaggart, the amount given away never was significant."

* * *

[10] "The products are not distributed directly for use in other activities of JSM."

[11] INTERROGATORY NO. 16:

"With respect to the mail order sales. . . ."

"A. Please describe in detail. . . .

"3. How prices set, notice to customers of prices, tax reimbursement, payment terms; authority to reduce prices or give away merchandise (and extent to which and by whom such authority was exercised);

ANSWER TO INTERROGATORY NO. 16:

"Prices were set by management and communicated to the purchasers in the media in which the items were offered."

". . . . The items were offered in five primary manners: The Evangelist, radio, television, product catalogs (or fliers) and special mailings."

". . . . The authority to redu e prices was vested in upper management only – normally Jimmy or Donnie Swaggart – and they likewise exercised the right to give merchandise away in situations they felt deemed such."

[12] "Again, there was no set procedure for establishing prices. Rather, prices were established on an item-by-item basis . . . . Any give-aways would occur when a visiting minister might be touring the facility and Jimmy Swaggart might offer him a bible as a gift. Other than the giving of items to visiting ministers, prices were not reduced below cost."

[13] "Again, there are no situations wherein the items in issue are distributed directly for use in other activities of JSM."

[14] INTERROGATORY NO. 18:

"Please identify (in the manner requested in the preface) each advertisement, notice, announcement or other writing, communication or action by which plaintiff or it's agent made known to California purchasers the availability or the price of the items in issue? With respect to which transactions was each used?"

ANSWER TO INTERROGATORY NO. 18:

"The availability and price of Ministry merchandise was communicated to prospective California purchasers in five primary ways: the Ministry's magazine, The Evangelist; radio programming; television programming; special sales literature such as catalogs and fliers; and direct mail letters or brochures . . . ."

[15] INTERROGATORY NO. 19:

"Please describe in detail step-by-step (including descriptions and identification of each writing, communication, and action) what you referred to as . . . ."

". . . less amounts were accepted for the materials, an in the case of persons without funds, the religious materials, nevertheless, were distributed."

ANSWER TO INTERROGATORY NO. 19:

"The policy of JSM to distribute religious materials notwithstanding that the person requesting the item may not remit the stated price has not been publicized. The policy has been communicated to those within JSM who likely would receive such a request, with instructions to

forward any requests to Donnie Swaggart. The decision to distribute religious materials in this manner is made by Donnie Swaggart."

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

THE JIMMY SWAGGART MINISTRIES	*	NUMBER 517830
PLAINTIFF	*	
VERSUS	*	
BOARD OF EQUALIZATION OF CALIFORNIA	*	

* * * * * * * * * * * * * * * * * * * *

OFFER OF PROOF

Introduction

In the absence of a written transcript of the trial proceedings in the captioned case held May 5 through May 7, 1986, it is impossible to accurately determine the content of the oral proof from witnesses excluded by the Court. However, the material excluded is believed to fall into three categories: (1) proof tending to show a violation of the due process clause of the United States Constitution by imposition of California use tax collection requirements on Jimmy Swaggart Ministries despite Jimmy Swaggart Ministries' lack of sufficient nexus with the State of California; (2) proof excluded on the issue of entanglement between the State of California (along with other states) and organized religious institutions, resulting from imposition of sales and use tax upon the transmission of the religious message in written form; and (3) necessary impact of the California sales and use tax law

and regulations upon religious organizations other than Jimmy Swaggart Ministries.

The offer of proof will be in a condensed narrative form combining the three categories listed above and consisting of proof that would have been elicited from one or both of the two witnesses called by Jimmy Swaggart Ministries, Reverend Jim Rentz and Mr. James Guinn.

Offer of Proof

Jimmy Swaggart Ministries ("JSM") has conducted only five religious crusades in the State of California for the years 1981 through May 31, 1986, a period of six years. These meetings consisted of two in 1981, one in 1982, one in 1983, none in 1984, one in 1985, and none in 1986 up to the present date. JSM has never had an office in the State of California and has only had one representative in the State of California, and he was there as a minister of the gospel solely for the purpose of counseling adherents of JSM and assisting adherents of JSM in their involvement in the ministry of Jimmy Swaggart Ministries. That representative, who served from 1978 through 1984 had no responsibility whatever for the distribution of tangible personal property in the form of religious-message content materials. Jimmy Swaggart Ministries does not pay sales or use tax to any state, municipal or other local government authority for the distribution of religious items at its crusades. JSM does not pay sales or use tax to any state, county, municipal or other local government authority for the distribution of

religious items by mail order out of the State of Louisiana. Jimmy Swaggart Ministries does not distribute these religious materials with the object of gain, benefit or advantage to JSM, directly or indirectly. Jimmy Swaggart Ministries is a church with auxilliary ministries in education including Biblical studies education. JSM has been recognized as a church, with such auxilliary ministries, by the Internal Revenue Service by virtue of rulings of the Internal Revenue Service of the United States which rulings are in written form and are part of the regular business records of JSM as well as being record of an official governmental action.

The sales and use tax statutes or ordinances of various states, counties, municipalities, or other special taxing districts throughout the United States provide varying rates of tax for different transactions in the vast number of taxing jurisdictions throughout the United States. A great number of these different state, local, municipal, county and special tax district tax statutes and ordinances have different rates of tax, require different permit requirements, and different forms of tax return.

The accounting involvement to collect, report, and file sales and use tax returns in all of these taxing jurisdictions throughout the United States would be an insurmountable burden for churches to bear in regard to the expense of distributing their religious message. The accounting and legal involvement required would be: (1) to determine the tax in each different location; (2) to keep track of all of the changes in that tax on at least a monthly basis; (3) to collect the different tax from individuals in each of those locations; (4) to report the different tax; (5) to secure and file returns in each of those locales; (6) to

respond to audit inquiries for each of these taxing jurisdictions; (7) to devise some method in many jurisdictions of advertising the price and the tax rate so that the individuals solicited for such donations or sales would know the amount of tax to send with their request so that the proper amount could be collected; (8) to develop a procedure to dub a different advertisement onto each tape for each different television station locale, which now exceeds 600 local television stations plus thousands of local cable outlets (the dubbed advertisement would have to be flexible enough to state the varying tax rates for the varying locations to which JSM would be required to mail religious-content materials within the viewing area of that station or cable outlet); (9) to prepare receipts to each of these individuals to properly account for the proper rate of tax; (10) to establish and maintain an extensive library constantly to provide and update the varying taxing rates and requirements for each of the thousands of taxing jurisdictions within the United States in state, county, municipal, and other special taxing districts.

Since many of the religious-content message materials are distributed for a donation JSM would be required to make a determination as to each taxing jurisdiction's treatment of such a transaction, and if it were taxable in such taxing jurisdiction a determination would have to be made as to each such taxing jurisdiction whether the tax would be imposed on the full amount of the donation or on the fair market value of the item requested, or on some other means of measurement. All of the foregoing accounting procedures and records would necessitate the development of new and different

computer software programs at a minimum expense of $2,000,000 and would require one to three years to develop and implement.

In addition to the television advertisement requirements described above, the *Evangelist* magazine and other ordering materials for such religious-content materials would have to be revised and substantially increased in length in order to inform individuals in all of the varying taxing jurisdictions described above as to how to calculate the tax owed on the materials they were ordering.

None of the 230 plus local churches and religious ministries from the size of one individual staff member to 1000 employees represented by Mr. Guinn in his practice as a certified public accountant representing religious organizations, pays sales and use tax on interstate sales. If those ministries, large and small, had to collect and pay over sales and use tax in all of the various cities, counties, states, school districts, transportation districts, and other special taxing districts in the country, most of them would have to cease distributing religious-content message materials or risk non-compliance, fines, and the necessarily bad publicity that would attend such non-compliance. This would have the effect of substantially inhibiting these religious organizations', churches' and individual evangelists' ability to spread their religious message.

The foregoing result of allowing such taxation of the distribution of religious-content materials by religious organizations would cause daily extensive entanglement between the states and local governments and religious organizations represented by Mr. Guinn, which are representative of churches, evangelists, and religious organizations throughout the country.

If the audit figure arrived at in California had not been stipulated, it could not have been accurately arrived at. The reason the tax figure could not have been accurately determined is the inadequacy of records. This is true even though the records are totally adequate for a complete and certifiable audit of Jimmy Swaggart Ministries' books and records according to the procedures specified by the American Institute of Certified Public Accountants. New systems would have to be established and new and different books and records kept in order to meet the requirements of California and all of the other state and local governments and taxing jurisdictions, at a cost impact that would tremendously reduce the effective distribution of the religious-content message by Jimmy Swaggart Ministries and by the other religious organizations represented by Mr. Guinn, both large and small.

The effect of the sales and use tax would be to place tax on what many people send to Jimmy Swaggart Ministries and other religious organizations as a donation, and this tax would be effectively imposed on the religious message itself or the privilege of preaching and teaching the religious message.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

DATE SEPTEMBER 16, 1986 MINUTES DEPT. 33

PRESENT: HON. JACK R. LEVITT JUDGE

CLERK JACK W. BOYD REPORTER _____

BAILIFF _____

517830

JIMMY SWAGGART MINISTRIES, Plaintiff	by Richard R. Gore and William D. Treeby
vs.	
BOARD OF EQUALIZATION, Defendant.	by Neal J. Gobar Deputy Atty General

This matter was heard on May 6 and 7, 1986, and was taken under submission on August 8, 1986, after receipt of briefs from counsel.

The Court finds for the defendant, Board of Equalization of California and awards its costs.

The Court has made its finding solely upon the issue framed by the pleadings as it relates to first amendment grounds.

The Court finds that the payment of the California sales and use taxes in context in this case did not interfere unconstitutionally with the free exercise of religion. The case of INSTITUTE IN BASIC YOUTH CONFLICTS, INC. v. STATE BOARD OF EQUALIZATION (1985), 166 Cal.App.3d 1093, is controlling and provides that the use tax is on the consumer, but requires the retailer to collect

it at the time of the sale, is an excise tax and does not raise concerns under the first amendment.

Counsel for defendant shall prepare an appropriate order.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
NEAL J. GOBAR,
Deputy Attorney General
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San Diego, Calif. 92101
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Attorneys for Defendant
State Board of Equalization

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO

THE JIMMY SWAGGART MINISTRIES,	) No. 517830
	) JUDGMENT
Plaintiff,	) (Filed Nov. 6, 1986)
v.	)
BOARD OF EQUALIZATION OF CALIFORNIA,	)
Defendant.	)

The above entitled action, having come on regularly for trial in Department 33 of the above entitled Court, before the Honorable Jack R. Levitt, Judge Presiding, without a jury, on May 6 and 7, 1986, plaintiff Jimmy Swaggart Ministries having appeared by Stone, Pigman, Walther, Wittmann & Hutchinson, by William D. Treeby and Judy Y. Barrasso, Esq., defendant State Board of Equalization having appeared by John K. Van de Kamp, Attorney General, by Neal J. Gobar, Deputy Attorney General; and evidence, both oral and documentary, including as well various written stipulations, having been introduced by both parties; the matter having been

argued and submitted, the Court having issued its decision by Minute Order dated September 16, 1986.

IT IS ORDERED, ADJUDGED AND DECREED and judgment is hereby rendered that plaintiff Jimmy Swaggart Ministries take nothing on his Complaint and that defendant State Board of Equalization recover its costs in this action in the amount of $ ___.

DATED: NOV 6 1986

/s/ JACK R. LEVITT
JACK R. LEVITT
JUDGE OF THE SUPERIOR COURT

[No. D005707. Fourth Dist., Div. One, Aug. 29, 1988]

[As modified Sept. 28, 1988.]

JIMMY SWAGGART MINISTRIES, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION, Defendant and Respondent.

SUMMARY

—The trial court entered judgment refusing a refund of sales and use taxes paid under protest to the state by an out-of-state religious organization. The organization, a nonprofit religious corporation, had conducted numerous evangelistic crusades in California, in cooperation with local churches. At the crusades, the organization sold religious books, records and tapes as well as other religious and nonreligious merchandise. After learning that the organization was selling tangible personal property at its crusades in California, the State Board of Equalization commenced an audit and notified the organization that it owed sales taxes based upon sales made at the California crusades, and use taxes based upon mail order sales to California purchasers. Thereafter, the board denied the organization's petition for a refund of the taxes paid. (Superior Court of San Diego County, No. 517830, Jack R. Levitt, Judge.)

The Court of Appeal affirmed. It held California's imposition of sales and use taxes on a religious organization does not violate the free exercise clause of U.S. Const., 1st Amend. (providing that Congress shall make no law prohibiting the free exercise of religion). It also

held the imposition of such taxes on the organization was not unconstitutional under the establishment clause of the First Amendment (providing that Congress shall make no law respecting an establishment of religion). Finally, the court held the sales and use taxes offended neither U.S. Const., 9th Amend., nor U.S. Const., 10th Amend. (Opinion by Kremer, P. J., with Work and Todd, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Taxpayers' Remedies § 11 – Proceedings and Actions to Recover Taxes Paid – Burden of Proof.** – In an action for a refund of taxes, the taxpayer has the burden of establishing all the facts necessary to establish its right to a refund.

[See Cal.Jur.3d, Sales and Use Taxes, § 23; Am.Jur.2d, Taxpayers' Actions, § 60.

(2a, 2b) **Sales and Use Taxes § 3 – Constitutionality – Imposition on Religious Organization.** – California's imposition of sales and use taxes (Rev. & Tax. Code, § 6001 et seq.) on a religious organization does not violate the free exercise clause of U.S. Const., 1st Amend. (providing that Congress shall make no law prohibiting the free exercise of religion). In substance, the sales and use tax laws catch all transactions which result in tangible personal property joining the aggregate of capital assets within the state. This produces one effect; not two. The practical and legal effect of such statutes is to make the vendor liable for a use tax due from the purchaser. That effect is not forbidden by the Constitution. Even though sellers are required to register before selling their products, this only

incidentally affects religion and does not turn the sales tax into an unconstitutional prior restraint on the free exercise of religion. Nor does the sales tax restrain the dissemination of a religious message.

(3) **State of California § 10 –Attorney General – Opinions,** – Opinions of the Attorney General are issued in response to specific questions posed by state legislators, officers and agencies and are not issued gratuitously. Also, opinions of the Attorney General are advisory only and do not carry the weight of law.

(4a, 4b) **Sales and Use Taxes § 18 – Use Tax – Constitutionality – Imposition on Religious Organization.** – The imposition of California's sales and use taxes (Rev. & Tax. Code. § 6001 et seq.), on a nonprofit, out-of-state religious organization that sold religious items during evangelistic crusades in California, was not unconstitutional under the establishment clause of U.S. Const., 1st Amend. (providing that Congress shall make no law respecting an establishment of religion). Neither the organization's difficulty in establishing past "sales" from its books due to its past accounting practices nor the requirement of future record-keeping involved the government with an excessive entanglement with religion so as to violate the establishment clause. Also, the statutory scheme, on its face, does not result in excessive administrative entanglement with regard to the work of religious and state employees in carrying out the scheme, state scrutiny of religious content, or enforcement by government investigators.

(5) **Constitutional Law § 53 – Freedom of Religion – Establishment Clause.** – Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring or supporting religion does not end the inquiry of excessive governmental entanglement between church and state. A reviewing court must also be sure that the end result – the

effect – is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. In analyzing either alternative, the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

(6a, 6b) **Taxpayers' Remedies § 2 – Exhaustion of Administrative Remedies – Religious Organization.** – On appeal from an action for a refund of sales and use taxes paid under protest by a nonprofit, out-of-state religious organization that sold religious items during evangelistic crusades in California, the organization failed to exhaust its administrative remedies with regard to the contentions that it was not a retailer engaged in business in the state, and that it did not have a sufficient nexus to California and thus could not be taxed without offending the commerce clause. Such issues were not raised by the organization in its claim for a refund from the State Board of Equalization; the only constitutional ground the organization specified was U.S. Const., 1st Amend. Also, nothing indicated it would have been futile to raise such issues, nor did these particular issues raise important questions of public policy. Instead, they raised factual questions, the determination of which was a matter of evidence.

(7) **Taxpayers' Remedies § 2 – Exhaustion of Administrative Remedies – Claim for Refund.** – Issues not raised in a claim for a refund may not be raised in a suit for a refund; the suit may be brought only on the grounds set forth in the claim (Rev. & Tax Code, § 6933). The claim for refund thus frames and restricts the issues for litigation. Failure to exhaust administrative remedies before the State Board of Equalization is a jurisdictional procedural defect

which bars court action contesting imposition of tax.

(8) **Taxpayer's Remedies § 2 – Exhaustion of Administrative Remedies – Rationale.** – The rationale behind the rule of confining a complaint and trial to issues raised in the claim for refund is exhaustion of remedies. Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the State Board of Equalization so that the board may be afforded the opportunity to rectify any mistake in tax collection. Such a rule prevents having an overworked court consider issues and remedies available through administrative channels.

(9) **Sales and Use Taxes § 3 – Nature and Purpose – Constitutionality Under Ninth and Tenth Amendments.** – U.S. Const., 9th Amend., providing that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, had no application to an action by a nonprofit, out-of-state religious corporation for a refund of sales and use taxes paid under protest, with regard to religious items sold during evangelistic crusades in California. The rights at issue, free exercise of religion and separation of church and state, are enumerated in the Constitution, in the first two clauses of U.S. Const., lst Amend. Also, U.S. Const., l0th Amend., providing that the power not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people, had no application to such taxpayer action. The power involved here, the power to tax, is inherently a power of the government, not of individual citizens, as the framers recognized by giving Congress the power to lay and collect taxes.

(10) **Appellate Review § 109 – Briefs – Argument and Authority.** – Where a point is merely asserted by appellant's counsel without any argument of or

authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.

COUNSEL

Ajalat & Polley, Charles R. Ajalat, Terry L. Folley, Richard J. Ayoob, Schall, Boudreau & Gore and Richard R. Gore for Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, and Neal J. Gobar, Deputy Attorney General, for Defendant and Respondent.

OPINION

KREMER, P. J. – The Jimmy Swaggart Ministries (ministries) appeals a judgment refusing a refund of sales and use taxes paid under protest to the State of California. Ministries contends the taxes burden the free exercise of religion, excessively entangle the state with religion and offend the Ninth and Tenth Amendments. Ministries also contends insufficient facts support findings it was a "retailer" within the meaning of the tax laws or that it had a sufficient nexus to California to allow imposition of the sales and use taxes, that the trial court committed various evidentiary errors and erroneously denied it leave to amend its complaint. We conclude the sales and use taxes are constitutional and that the record does not support Ministries's other contentions. Therefore, we affirm.

FACTS

During the period in question (1974-1981), Ministries was a nonprofit religious corporation affiliated with the

Assemblies of God church.[1] Ministries describes itself as "an evangelistic outreach to promote the gospel of Jesus Christ" by all available means, including "evangelistic crusades," radio and television broadcasting (both as owner and broadcaster), recording music and preaching, writing and publishing "and, [by] any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ"[2]

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[1] The parties stipulated that Ministries "called itself a 'church-affiliated evangelistic outreach.' "

In 1980, Ministries began holding local church services in Baton Rouge, Louisiana, and applied to change its federal tax exemption from a religious organization to a church. Eventually, in 1982, the Internal Revenue Service granted the income tax class status change to "church" based on services being held at the Baton Rouge church, making the change retroactive to 1980.

[2] Ministries's [sic] constitution and by-laws provided: "That Jimmy Swaggart Ministries is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God, our heavenly Father in which the Holy Spirit will be honored according to our distinctive testimony; to assume a proper share of responsibility and privilege of propagating the gospel of Jesus Christ by all available means, both at home and in foreign lands. This outreach shall not be limited as to method, but shall specifically include evangelistic crusades; missionary endeavors; education (including pre-school, kindergarten, elementary, secondary, and post-secondary); radio broadcasting (as owner, broadcaster, and placement agency); television broadcasting (both as owner and broadcaster); and audio production and reproduction of music; audio production and reproduction of preaching; audio production and reproduction of teaching; writing, printing and publishing; and, any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ."

During 1974-1981, Ministries conducted numerous "evangelistic crusades" in auditoriums and arenas across the country in cooperation with local churches. Over this period, Ministries held 23 crusades in California. The crusades lasted one to three days, with one crusade lasting six days. The crusades in California totaled 52 days over the period involved here. At the crusades, Ministries conducted services which included preaching and singing. Some of these services were recorded for later sale and/or broadcast. Outside, Ministries sold religious books, records and tapes as well as other religious and nonreligious merchandise[3] at tables for either cash or credit card.

Ministries also published a magazine, "The Evangelist," which was sold nationwide by subscription. "The Evangelist" had California subscribers. The articles in the magazine were generally of a religious nature. Ministries advertised its religious books, tapes and records for sale

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[3] This merchandise included mugs, bowls, plates, pen and pencil sets, bud vases, communion cups, candlesticks, a replica of a Roman coin, prints of religious scenes, T-shirts with Ministries's [sic] logo, replicas of the Crown of Thorns and Ark of the Covenant. This merchandise is not strictly the subject of this lawsuit. Ministries and the board stipulated: "In October, 1985, JSM and SBE agreed that JSM could amend its prayer and eliminate its contest of the taxability of the sale and use of certain items included in paragraphs 4, 8 and 9 above which plaintiff says do not have specific religious-message content- . . . that the parties will after trial try to determine the amounts by agreement if necessary or by a subsequent court hearing."

in the magazine[4] and included an order blank listing the various items for sale in the particular issue, their unit price and provided spaces for filling in the quantity desired and the total price. Ministries also offered items for sale on its radio and television broadcasts.

In early 1980, the Board of Equalization of the State of California (Board) became aware Ministries was selling tangible personal property at its crusades in California. The Board informed Ministries that there was no sales tax exemption for religious materials and requested Ministries to register as a seller (to facilitate reporting and paying tax on sales). Ministries asserted it was exempt under the First Amendment.

In 1981, an audit commenced. The auditor suggested Ministries was also liable for a use tax on its mail order sales to California residents. In July 1981, the Board advised Ministries that (1) it should register as a seller, report and pay sales tax on all sales made at its California crusades, and (2) that there was a sufficient nexus with

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[4] For example, in the June 1981 issue of "The Evangelist," Ministries advertised: "GIANT EIGHT-TRACK TAPE SALE [§] Five eight-tracks normally sell for $30. However, you can now get five at our special sale price of $15 – that's half price. We are overstocked and have no place to store all these tapes. Our new building is underway, but it will be six months before it is completed. We have to move the stock now. Take advantage of this half-price sale – AVAILABLE IN EIGHT-TRACKS ONLY." The eight-track tapes available for sale included such titles as "You Don't Need to Understand," "Jesus is the Sweetest Name I Know," and "The Sacred Strings of Jimmy Swaggart." The ad finished by stating "AVAILABLE IN SETS OF 5 ONLY – $6 each when purchased separately. [¶] Any 5 tapes – $15 [¶] Any 10 tapes – $30 [¶] Any 15 tapes – $45."

the State of California to require Ministries to collect and report use tax on its mail order sales to California purchasers.

Ministries cooperated with the Board by making its records available. Based on the records Ministries had provided, the parties stipulated "that [Ministries] sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [Ministries] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." The Board notified Ministries it owed sales and use taxes of $118,294.54 plus interest of $36,021.11 and a penalty of $11,829.45 for a total amount due of $166,145.10. Ministries filed a petition for redetermination with the Board, arguing exemption from the tax under the First Amendment. Following a hearing and an appeal to the Board, the Board deleted the penalty but otherwise redetermined the matter without adjustment in the amount of $118,294.54 in taxes owing plus $65,043.55 in interest. Ministries paid the amount but filed a petition for redetermination and a refund with the Board. When the Board denied Ministries's [sic] petition, Ministries brought this lawsuit, seeking a refund of the taxes paid.

Following a trial, the trial court entered judgment for the Board, ruling that Ministries was not entitled to a refund of any taxes.

Discussion

I

The Sales and Use Tax Law (Rev. & Tax Code, § 6001 et seq.)[5] requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail . . . ." (§ 6051.) A "sale" includes any transfer of title of tangible personal property in any manner. (§ 6006.)

The use tax is complementary to the sales tax. It is "imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use, or other consumption" (§ 6201) at the same rate as the sales tax. The use tax is on the purchaser (§ 6202) but is generally collected by the retailer at the time the sale is made (§§ 6202-6206).

(1) In an action for a refund of taxes, the taxpayer has the burden of establishing all the facts necessary to establish its right to a refund. (*El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 744-745 [215 P.2d 4], app. dism. 340 U.S. 801 [95 L.Ed. 589, 71 S.Ct. 52]; *Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744-745 [180 Cal.Rptr. 479].)

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[5] All statutory references are to the Revenue and Taxation Code unless otherwise specified.

Neither the California Constitution nor the Sales and Use Tax Law exempts religious organizations generally from sales and use taxes.[6]

II

(2a) Ministries contends California's imposition of the sales and use taxes on it violates the free exercise clause of the First Amendment.[7] In support of this argument, Ministries relies primarily on the United States Supreme Court's 1943 decision in *Murdock v. Pennsylvania* (1943) 319 U.S. 105 [87 L.Ed. 1292, 63 S.Ct 870, 146 A.L.R. 81]

In *Murdock,* Jehovah's Witnesses were convicted of violating a city ordinance which required all persons canvassing within the city to procure a license and pay a fee. The Supreme Court framed the issue before it as "a

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[6] California's Sales and Use Tax Law does provide a limited exemption from the sales and use tax for the serving of meals by religious organizations. (§ 6363.5.)

Several other states statutorily exempt religious organizations from sales and use taxes. (*See, e.g.,* Ark. Stat. Ann. § 26-52-401, subds. (1), (14); Fla. Stat. Ann. § 212.06, subd. (9); Iowa Code Ann. § 422.45, subd. (3); Mo. Ann. Stat § 144.030, subd. (19); Nev. Rev. Stat. § 372.325, subd. 5; N.J. Stat. Ann. § 54:32B-9, subd. (b)(1); N.Y. Tax Law, § 1116, subd. (a)(4); N.D. Cent. Code, § 57-39.2-04, subd. 4; Pa. Stat. Ann., tit. 72, § 7204, subd. (10).)

[7] The free exercise clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." The equivalent California constitutional provision states: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." (Cal. Const., art 1, § 4.)

single issue – the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." (*Id.* at p. 110 [87 L.Ed. at p. 1297].)

The Supreme Court observed: "The hand distribution of religious tracts is an age-old form of missionary evangelism – as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press." (*Id.* at pp. 108-109 [87 L.Ed. at p. 1296], fns. omitted.)

The Supreme Court discussed *Jones v. Opelika* (1942) 316 U.S. 584 [86 L.Ed. 1691, 62 S.Ct. 1231, 141 A.L.R. 514], which was reargued at the same time the *Murdock* case was argued. In the first *Opelika* opinion, the court had upheld convictions against Jehovah's Witnesses for violating a similar license ordinance because the Jehovah's Witnesses had used "ordinary commercial methods of sales of articles to raise propaganda funds." (*Id.* at p. 597 [86 L.Ed. at p. 1702].) The *Opelika* court had concluded it

was proper for the state to charge "reasonable fees for the privilege of canvassing." (*Ibid.*)[8] The *Murdock* court observed sometimes the determination whether an activity is "religious or purely commercial" is difficult to make; "[t]he distinction at times is vital." (*Murdock v. Pennsylvania, supra,* 319 U.S. at p. 110 [87 L.Ed. at p. 1297].)

"[T]he mere fact that religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." (*Id.* at p. 111 [87 L.Ed. at p. 1297].)

In *Murdock,* the city argued the ordinance was valid because it was "nondiscriminatory." The court rejected

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[8] By memorandum opinion, the Supreme Court reversed the *Jones* decision "[f]or the reasons stated in the opinion of the court in [*Murdock*]." (*Jones v. Opelika* (1943) 319 U.S. 103 [87 L.Ed. 1290, 63 S.Ct. 890].)

this argument, stating: "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." (*Id.* at p. 115 [87 L.Ed. at pp. 1299-1300].) The *Murdock* court concluded the flat license tax before it, which was unrelated to receipts or income and which was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question," was an unconstitutional restraint on the free exercise of religion (*Id.* at pp. 113-114 [87 L.Ed. at p. 1299].)

Following *Murdock*, the Supreme Court, in *Follett v. McCormick* (1944) 321 U.S. 573 [88 L.Ed. 938, 64 S.Ct. 717, 192 A.L.R. 317], explained the *Murdock* holding was not restricted to itinerant preachers but also prohibited imposition of a flat license tax on Jehovah's Witnesses who earned their livelihood as evangelists or preachers in their home town. The *Follett* court stated: "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. . . .A preacher has no less a claim to that privilege when he is not an itinerant." (*Id.* at pp. 576-577 [88 L.Ed. at pp. 940-941].)

Ministries argues there is no significant difference between hand distribution and mail distribution or

between printed religious matter and recorded religious matter; in either case the distribution is entitled to "as high a claim to constitutional protection as the more orthodox types" of spreading one's religious beliefs. (See *Murdock v. Pennsylvania, supra,* 319 U.S. at p. 110 [87 L.Ed. at p. 1297].) We agree. Evangelism, whether by "age-old" methods or by new technologies, is protected by the free exercise clause of the First Amendment. However, we disagree with Ministries's subsequent conclusion *Murdock* and *Follett* compel us to hold the sales and use taxes here unconstitutional.

Ministries argues since the funds raised from the sale of religious materials are used to produce other religious materials to further spread the gospel and "to remain a going concern" (see *Murdock v. Pennsylvania, supra,* 319 U.S. at p. 111 [87 L.Ed. at p. 1297]) and payment of sales and use taxes diminishes the amount of funds available for this evangelistic work, the taxes are an unconstitutional burden on Ministries's right "to [spread] their religious beliefs through the spoken and printed work" (*ibid.*) as guaranteed by the Constitution and stated in the *Murdock* and *Follett* cases. We disagree. Ministries has expanded the scope of those decisions beyond their holdings.

The holdings of *Murdock* and *Follett* were both limited to the constitutionality of a particular type of tax, a flat license tax which was unrelated to receipts, income or the administrative costs of a regulatory scheme and which acted as a prior restraint on the exercise of a constitutional right. The Supreme Court did not equate a financial burden in and of itself with an unconstitutional burden on the exercise of religion.

As the Supreme Court explained in *Follett* v. *McCormick, supra,* 321 U.S. at pages 577-578 [88 L.Ed. at p. 941]: "[We do] not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the Murdock case . . . ."

In *United States* v. *Lee* (1982) 455 U.S. 252 [71 L.Ed.2d 127, 102 S.Ct. 1051], the Supreme Court held an Amish employer could be constitutionally required to pay social security tax despite his religiously based belief forbidding the payment or receipt of social security benefits. The court acknowledged the "compulsory participation in the social security system interferes with [the Amishes'] free exercise rights," but nonetheless upheld that compulsory participation. (*Id,* at p. 257 [71 L.Ed.2d at p. 132].) The court reaffirmed its position that "[n]ot all burdens on religion are unconstitutional" and explained: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*Id,* at pp. 257, 261 [71 L.Ed.2d at pp. 132, 134-135].) The court held a "state may justify a limitation on religious liberty by showing that it is essential to accomplish some overriding governmental interest." (*Id.* at pp. 257-258 [71 L.Ed.2d at

p. 132].)[9] The justifying governmental need in *Lee* was assuring mandatory and continuous participation in and contribution to the nation-wide social security system. (*Id.* at pp. 258-259 [71 L.Ed.2d at pp. 133-134].)

Subsequently, in *Minneapolis Star v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575, 586 [75 L.Ed.2d 295, 305, 103 S.Ct. 1365], (*Minneapolis Star*) the Supreme Court recognized a state's general interest in raising revenue is an important governmental interest; "that interest is critical to any government." In *Minneapolis Star,* the Supreme Court held that Minnesota's use, [sic] tax which taxed newspapers differently than other enterprises (taxing the paper and ink used in the paper, not just the finished product) and which singled out a handful of newspapers for this different treatment, was unconstitutional because it discriminated against the press. The court, however, in the course of its opinion, also explained: "our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." (*Id.* at p. 587, fn. 9 [75 L.Ed.2d at p. 306]; accord

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[9] Compare *Lyng* v. *Northwest Indian Cemetery Protective Ass'n* (1988) 485 U.S. ___, ___ [99 L.Ed.2d 534, 547-548, 108 S.Ct. 1319, 1326], involving the government's right to build a road on National Forest land through a traditional Indian burial ground despite its potentially "devastating effects" on the practice of a particular religion. In a narrow interpretation of the free exercise clause, the Supreme Court rejected a requirement the government must demonstrate a compelling need for the road at that particular location to justify the burden on the practice of religion. The court stated: "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' [Citation.]" (*Ibid.*)

Arkansas Writers' Project, Inc. v. Ragland (1987) 481 U.S. ___, ___ [95 L.Ed.2d 209, 219, 107 S.Ct. 1722, 1727].)[10]

The Supreme Court made this statement in response to an argument a generally applicable sales tax could never pass muster under the First Amendment. The newspapers cited in support of their argument the *Follett*, *Murdock*, and *Opelika* cases. The court responded: "Whatever the value of those cases as authority after *Breard*,[11]

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[10] In Arkansas Writers' Project, Inc. v. Ragland, supra, 481 U.S. ___, ___ [95 L.Ed.2d 209, 219, 107 S.Ct. 1722, 1727], the Supreme Court held Arkansas's sales tax scheme which taxed general interest magazines but exempted newspapers and religious, professional, trade and sports journals violated the First Amendment because it was discriminatory. The court found the selective taxation was "more disturbing" than the tax in *Minneapolis Star* because the Arkansas tax scheme determined tax status based entirely on the magazine's content. (*Ibid.*) The Supreme Court affirmed its *Minneapolis Star* position "that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible." (*Ibid.*)

[11] In *Breard v. Alexandria* (1951) 341 U.S. 622 [95 L.Ed. 1233, 71 S.Ct. 920, 35 A.L.R.2d 335], the Supreme Court upheld a conviction against a door-to-door magazine subscription salesman for violating an ordinance prohibiting door-to-door solicitation of private residences without a prior request or invitation from the resident. The court stated "Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents." (*Id.* at pp. 644-645 [95 L.Ed. at p. 1249]; see also *Frisby v. Schultz* (1988) ___ U.S. ___ [56 U.S.L. Week 4785] (upholding an ordinance prohibiting picketing in front of a private residence against a First Amendment challenge).)

we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. [Citations.] In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax." (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. at p. 557, fn. 9 [75 L.Ed.2d at p. 306], italics in original.)

Relying on this reasoning in *Minneapolis Star,* the Second District, Division Seven of our Court of Appeal in *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization* (1985) 166 Cal.App.3d 1093 [213 Cal.Rptr. 98] (*Institute*), held the California use tax could be imposed on a nonprofit religious organization without offending the free exercise clause. *Institute* involved a nonprofit religious organization which conducted religious seminars across the country. The organization charged individuals one fee for its seminar and a separate fee for the printed syllabus. The organization also sold religious books and pamphlets, which were not directly related to the seminars, through the mail. The organization asserted California could not impose sales and use taxes on its sale of religious literature without offending the free exercise clause.

The Court of Appeal rejected this argument as to the use tax. Relying on *Minneapolis Star's* language concerning the constitutionality of a generally applicable sales

tax and distinguishing *Murdock* and *Follett*, the Court of Appeal concluded the use tax did not offend the free exercise clause because "[t]he tax in this case is not a flat tax and it is related to the receipts or income of the plaintiff." (*Id.* at p. 1105.) The court also pointed out the use tax is on the consumer, not the religious organization/seller; the religious organization/seller only collects the tax on behalf of the consumer. (*Id.* at p. 1106.)

The *Institute* court also relied on our Supreme Court's decision in *Watchtower B. & T. Soc. v. County of L.A.* (1947) 30 Cal.2d 426, 431 [182 P.2d 178], certiorari denied 332 U.S. 811, which had upheld an assessment of an ad valorem tax on religious literature stored in Los Angeles County. The California Supreme Court stated: "It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike." (*Id.* at p. 430.)

The *Institute* court, however, did not similarly uphold imposition of the California sales tax because the Legislature had cast California's sales tax as a "privilege or occupation tax imposed upon the privilege of selling tangible personal property at retail." (*Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization, supra,* 166 Cal.App.3d at p. 1105; § 6051.) The court explained: " . . . the method [the Legislature] has chosen, a privilege or occupation tax, is constitutionally infirm under the First Amendment when applied to respondent. As stated in *Murdock, supra,* 319 U.S. at page 115 . . . , '[t]he privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution.' Accordingly, respondent cannot be taxed for the privilege

of doing that which it has already the right to do." (*Id.* at p. 1106.)

The Board in *Institute* argued California's interest in raising revenue justified the sales tax. The Court of Appeal was not persuaded. It concluded there was " 'an alternative means of achieving the same interest without raising concerns under the First Amendment,' " that is, the use tax which the Legislature had cast as "[a]n excise tax . . . on the storage, use, or other consumption in this state of tangible personal property" (§ 6201). (*Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization, supra,* 166 Cal.App.3d at p. 1106.) We believe the *Institute* court erred when it relied on a privilege analysis to find the sales tax unconstitutional.

The United States Supreme Court, in *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 [51 L.Ed.2d 326, 97 S.Ct. 1076], rejected this privilege analysis for determining the constitutionality of a tax. Before the *Complete Auto* decision, courts had focused on whether a tax was a tax directly upon the "privilege" of engaging in a constitutionally protected activity (in which case it was invalid) or whether it was a tax merely on income earned (in which case it was valid). (Compare, e.g., *Railway Express Agency v. Virginia* (1954) 347 U.S. 359, 362, 369 [98 L.Ed. 757, 761-762, 74 S.Ct. 558] with *Railway Express Agency v. Virginia* (1959) 358 U.S. 434, 437-439 [3 L.Ed.2d 450, 453-454, 79 S.Ct. 411], where the Virginia Legislature recast an "annual license tax" levied on gross receipts for the "privilege of doing business in this State" to a "franchise tax" on "intangible property" in the form of a "going-concern" value as measured by gross receipts.) In

Complete Auto, the Supreme Court held the critical question was not whether the tax was on a "privilege," but whether the tax had a "forbidden effect." The Court explained: "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." (*Complete Auto Transit, Inc. v. Brady, supra,* 430 U.S. at p. 288 [51 L.Ed.2d at p. 337].)

The Court of Appeal in *Institute* misfocused on how the Legislature labeled the sales tax (a "privilege") and thereby improperly focused on formalism rather than on substance.[12] We believe the substantive effect of the sales tax on a religious organization produces no forbidden effect.

As the *Institute* court itself recognized, sales and use taxes are "complementary": " ' . . . [i]n substance, the sales and use tax laws constitute a double filter designed

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[12] Compare *Covenant Community Church v. Lowe* (Tenn. 1985) 698 S.W.2d 339 [58 A.L.R.4th 267], appeal dismissed 475 U.S. 1078, where the Tennessee Supreme Court upheld imposition of a 5 percent privilege tax on the occupancy of motel rooms on a church which rented motel rooms for conducting its services and providing religious instruction. The court explained: "The 5% privilege tax imposed upon a hotel and motel occupancy in Knox County is not a tax on tithes and offerings, as argued by Covenant, nor is it even an indirect tax on tithes and offerings. It is a tax upon the secular activity of occupying a hotel or motel room, and Covenant has freely chosen to occupy such rooms. The act does not bar or limit any religious practice and, thus, we conclude that the free exercise rights of appellant church have not been violated." (*Id.* at p. 341.)

to catch all transactions which result in tangible personal property joining the aggregate of capital assets within the state.' " (166 Cal.App.3d at pp. 1098, 1106.) This "double filter" produces one effect; not two. (Accord *Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340, 344 [98 L.Ed. 744, 748, 74 S.Ct. 535], "The practical and legal effect of the Maryland statute . . . is to make the vendor liable for a use tax due from the purchaser. In economic consequence, it is identical with making him pay a sales tax.") That effect is not forbidden by the Constitution. The Supreme Court so concluded in *Minneapolis Star* where it stated a generally applicable sales tax is constitutionally permissible. (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. at p. 587, fn. 9 [75 L.Ed.2d at pp. 305-306].) While *Minneapolis Star* involved newspapers sales rather than sales by a religious organization, we see no reason to distinguish between the two in this situation, particularly in light of the Supreme Court's comments in *Heffron v. Int'l Soc. for Krishna Consc.* (1981) 452 U.S. 640 [69 L.Ed.2d 298, 101 S.Ct. 2559].

In the *Krishna* case, the Supreme Court faced a challenge based on the free exercise clause to a Minnesota statute requiring a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds (i.e., at an assigned booth of which there were only a limited number available on a first come, first served basis). The Supreme Court recognized the Krishnas' oral and written dissemination of their religious views and doctrines was protected by the First Amendment and that this protection was not lost because the written materials sought to

be distributed were sold rather than given away or because the Krishnas solicited contributions or gifts in the course of propagating their faith (*Id.* at p. 647 [69 L.Ed.2d at p. 306]. The Supreme Court, however, went on to say: "It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. [Citations.] As the Minnesota Supreme Court recognized, the activities of [the Krishnas], like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. [Citations.]" (*Ibid.*)

The Supreme Court upheld the state's authority to restrict the Krishnas to specified locations on the fairground based on the state's interest "in protecting the 'safety and convenience' of persons using a public forum." (*Id.* at 650 [69 L.Ed.2d at p. 308].) The Supreme Court concluded: "None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor the present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature." (*Id.* at pp. 652-653 [69 L.Ed.2d at p. 309].)

By analogy, a religious organization which seeks to disseminate its religious message through sales of religious books, tapes and records should not enjoy rights to communicate and distribute their message superior to those of "other organizations having social, political, or other ideological messages to proselytize" (*ibid.*), such as newspapers, and therefore, like the "other organizations" should be subject to the sales tax.

Ministries nonetheless argues the sales tax acts as a prior restraint on the free exercise of religion because, under the statutory scheme, sellers are required to register before selling their products. (*See* §§ 6066-6074; Cal. Code Regs., tit. 18, § 1699.) This registration requirement, Ministries asserts, is no different from the flat license tax in *Murdock*. We disagree.

In *Murdock*, the Supreme Court explained: "The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce [citations], it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden.' [Citations.]" (*Murdock v. Commonwealth of Pennsylvania, supra*, 319 U.S. at p. 114, fn. 8 [87 L.Ed. at p. 1299].)

Here, the permit process is part of a regulatory scheme to facilitate the payment of sales taxes; it only

incidentally affects religion. No fee was charged for registering and the taxes were due regardless whether Ministries had preregistered. Contrary to Ministries's assertion, the registration requirement does not turn the sales tax into an unconstitutional prior restraint on the free exercise of religion.[13]

Nor does the sales tax restrain the dissemination of a religious message as did the license requirements in the *Murdock* line of cases. The sales tax is not imposed as a precondition of disseminating the message, but is imposed only after the message has been successfully disseminated, i.e., a sale has been made.

(3) (See fn. 14.),(2b) We conclude California's imposition of sales and use taxes on a religious organization

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[13] In support of their argument the sales tax produces a forbidden effect, Ministries quotes the following warning by the Supreme Court in *Murdock v. Pennsylvania, supra,* 319 U.S. at page 112 [87 L.Ed. at p. 1298]: "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance."

Our California Supreme Court explained 50 years ago in *Watchtower B & T Soc. v. County of L.A., supra,* 30 Cal.2d at page 432: "While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty invoked is made realistic by the protection afforded by that government."

does not violate the free exercise clause of the First Amendment.[14]

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[14] Ministries also cites in support of its position an Attorney General opinion holding the imposition of sales and use taxes on educational materials supplied to students in a church-related school would violate the religion clauses of the First Amendment. (63 Ops.Cal.Atty.Gen. 69 (1980).) Ministries implies the Attorney General is bound by this opinion because the opinion has not been overruled or otherwise withdrawn by the Attorney General. The Board argues this opinion no longer represents the Attorney General's position. During oral argument, the Deputy Attorney General representing the Board informed the court he had obtained express authorization from his supervisors to argue against the earlier Attorney General opinion.

Initially, we note while it is true, as Ministries points out, that this opinion has not been overruled by the Attorney General, it is also true the Attorney General has not affirmed this position either; there have been no new opinions issued on this specific topic in the past eight years. Opinions of the Attorney General are issued in response to specific questions posed by state legislators, officers and agencies and are not issued gratuitously. (*See* Gov. Code, § 12519.) Second, opinions of the Attorney General are advisory only and do not carry the weight of law. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 870 [136 Cal.Rptr. 429].) We find the Attorney General's opinion unpersuasive in its reliance on a privilege analysis and in light of subsequent court decisions.

III

(4a) Ministries contends imposition of the use tax is unconstitutional because it offends the establishment clause of the First Amendment.[15]

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." (*Walz v. Tax Commission* (1970) 397 U.S. 664, 668 [25 L.Ed. 697, 701, 90 S.Ct. 1409].) The Supreme Court has observed: "The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." (*Lemon v. Kurtzman* (1971) 403 U.S.

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[15] The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ." The equivalent California constitutional provision states: "The Legislature shall make no law respecting an establishment of religion." (Cal. Const., art. I, § 4.)

602, 612 [29 L.Ed.2d 745, 755, 91 S.Ct. 2105], overruled on other grounds in *Mueller v. Allen* (1983) 463 U.S. 388 [77 L.Ed.2d 721, 103 S.Ct. 3062], italics in original.)

In *Lemon v. Kurtzman, supra,* at pages 612-613 [29 L.Ed.2d at p. 755], the Supreme Court announced three "tests" which a statute must pass to avoid the prohibition of the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.' "

Ministries does not contest the secular purpose of the sales and use taxes; they are clearly directed to the secular purpose of raising revenue.[16] Nor does Ministries, in its establishment clause argument, argue the taxes' principal or primary effect either advances or inhibits religion. The primary effect of the taxes is raising revenue. To the extent Ministries argues the taxes inhibit religion, that argument has been made and discussed in the context of the free exercise clause. Ministries focuses on the third test – excessive governmental entanglement.

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[16] Note *Mueller v. Allen, supra,* 463 U.S. at pages 394-395 [77 L.Ed.2d at p. 728], where the Supreme Court observed: "Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. [Citations.] This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

The Supreme Court has recognized total separation between church and state "is not possible in an absolute sense"; "[s]ome relationship between government and religious organizations is inevitable." (*Lemon v. Kurtzman, supra,* 403 U.S. at p. 614 [29 L.Ed.2d at p. 756].) "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred indistinct, and variable barrier depending on all the circumstances of a particular relationship." (*Ibid.*)

The taxation area is one where there is necessarily some entanglement between church and state, whether the state imposes a tax or grants an exemption. (5) As the Supreme Court observed in *Walz v. Tax Commission, supra,* 397 U.S. 664, a case upholding New York's property tax exemption for religious organizations on property used exclusively for religious worship against an establishment clause challenge: "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result – the effect – is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

"Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than

taxing them." (*Id.* at pp. 674-675 [25 L.Ed.2d at pp. 704-705].) The *Walz* court concluded: "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." (*Id.* at p. 675 [25 L.Ed.2d at p. 705].)

One commentator has observed: "Entanglement forms the basis of five first amendment doctrines: (1) In challenges to government action under the establishment clause, the action is unconstitutional if it creates excessive administrative entanglement between church and state. (2) Under the establishment clause, the action is also unconstitutional if it turns over traditionally governmental powers to religious institutions. (3) In establishment clause challenges, the challenged action is subjected to stricter scrutiny if it breeds religiously based political divisiveness. (4) In seeking a religiously based exemption from a law or regulation, a party *may* be able to prevail under the establishment clause by showing that enforcement would create excessive administrative entanglement. (5) Courts and other agencies of government may not inquire into pervasively religious issues." (Tribe, American Constitutional Law (1988) § 14-11, pp. 1226-1227, italics in original.)

(4b) Ministries claims there would be excessive governmental entanglement with its organization as a result of the difficulty of separating "sales" from "donations" and because it would be forced to hire "large staffs of people and go to very significant expense to deal with the government auditors, there would be a huge involvement of government auditors determining what motivations

were 'purely' religious (i.e., a pure donation), and to what extent the donor was motivated by the religious objective of receiving the religious material." This argument goes to excessive administrative entanglement.

Administrative entanglement has been found excessive where religious and state employees must work closely together to carry out the statutory scheme, when the state becomes involved in scrutinizing religious content or when enforcement requires government investigators to make on site inspections or engage in surveillance of the religious organization to ensure a secular purpose is served. (*See Aguilar v. Felton* (1985) 473 U.S. 402, 411, 414 [87 L.Ed.2d 290, 298-299, 300-301, 105 S.Ct. 3232]; *Larson v. Valente* (1982) 456 U.S. 228, 255 [72 L.Ed.2d 33, 54-55, 102 S.Ct. 1673]; *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290 [85 L.Ed.2d 278, 105 S.Ct. 1953]; American Constitutional Law, *supra*, at § 14-11, p. 1227.)

On its face, the statutory scheme does not result in this sort of administrative entanglement. The statutory scheme does not involve state employees in the day-to-day operations of Ministries. Contrary to Ministries's assertion, imposition of the sales and use taxes does not involve the government in questioning the religious nature of the materials involved nor the motivation for selling or purchasing the items since the materials are subject to the sales and use taxes regardless of content or motive. The critical question is not whether the materials are religious, but whether there is a sale or use, a question which involves only a secular matter. Nor does the statutory scheme require any on-site, continuing inspection. Contrary to Ministries's suggestion, the Sales and

Use Tax Law does not contemplate "official and continuing surveillance" (see *Walz v. Tax Commission, supra,* 397 U.S. at p. 675 [25 L.Ed.2d at p. 705]) by government auditors.

Nor does the record support Ministries's factual assertions. Ministries's assertion it was "impossible" to separate "sales" from "donations" rests largely on the testimony of a certified public accountant who conducted an audit of Ministries's books. This accountant, in his financial statement for Ministries, lumped "sales" and "contributions" together because, in hindsight, reviewing books he had not kept, he felt unable to accurately segregate Ministries's income into "sales" versus "donations." He testified part of this difficulty was due to people sending in more than the cost of a particular item (e.g., someone could send in $100 for a $5 album) and "the mail room – they would charge [all of] it to a donation." The accountant opined this difficulty in separating sales from donations could exist even when an order blank listing the price accompanied the request for the album. He stated, in his opinion, there would need to be "intensive training of the existing personnel [in the mail room] as to the difference between a donation and a purchase or what portion is a purchase and what portion is a donation and monitoring of that."

While this testimony tends to support Ministries's position, the trial court was not required to accept it, particularly when much of the accountant's testimony was based on the difficulties he encountered in resurrecting what had happened in the past rather than the difficulties in ascertaining the amount of sales versus

donations in the future. Moreover, there was other evidence indicating Ministries had a sophisticated accounting staff and had recently computerized its accounting and that Ministries in its own books and for purposes of obtaining a federal income tax exemption segregated "retail sales" from "donations."[17]

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[17] In its books, Ministries had at least six categories for donations ("crusade," "radio," "t.v.," "mission," "radio stations" and "other") and at least four categories for sales ("retail," "wholesale," "meeting & crusade," and "master charge"). Ministries's books also had a category for "sales Fgt. shipping."

In its 1980 application for recognition of an exemption from federal taxes under section 501(c)(3) of the Internal Revenue Code, Ministries stated it had " . . . four primary sources of financial support; [¶] (1) Donations are received by collections made during the religious service conducted three (3) times per week at the Church . . . and during special evangelistic services conducted worldwide in municipal auditoriums; and through contributions solicited from those attending services in Baton Rouge, Louisiana and the general public either by direct personal appeal, by radio and television programs, by appeals made in the monthly publication 'The Evangelist', or other direct mail solicitation. [¶] (2) Monies received from the sale of copyrighted religious material such as books, pamphlets, records and tapes. [¶] (3) Fees received from the sale of radio broadcast time to religious programmers sharing similar beliefs with the [Ministries]. [¶] (4) Gift annuities, bequests, donations in trust, and other gifts received through estate planning guidance and other fund-raising efforts established by [Ministries's] Stewardship Department."

In its 1981 filings for a federal income tax exemption, Ministries distinguished between "gifts, grants, and

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Neither Ministries's difficulty in establishing past "sales" from its books due to its past accounting practices nor the requirement of future record-keeping involve the government with an excessive entanglement with religion so as to violate the establishment clause.[18]

IV

(6a) Ministries contends the sales and uses taxes should not have been imposed here because Ministries was not a "retailer engaged in business in this state" within the meanings of sections 6013 and 6203 and Ministries did not have a sufficient nexus to California and

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contributions received" and "gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is not a business unrelated to the organizations's charitable, etc. purpose" for the years 1977 through 1980, distinguished between the "gifts, grants, and similar amounts received" and "gross sales minus returns and allowances" for 1981, and attached comments separately addressing "the sales of religious books, records, and tapes" and "donations."

[18] Compare *Tony & Susan Alamo Foundation v. Sec'y of Labor, supra,* 471 U.S. at pages 305-306 [85 L.Ed.2d at page 291], where the court noted the recordkeeping requirements of the Fair Labor Standards Act " . . . bear no resemblance to the kind of government surveillance the court has previously held to pose an intolerable risk of government entanglement with religion. The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations [citation] and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." (Fns. omitted.)

therefore could not be taxed without offending the commerce clause. These issues involve determinations of factual matters (which Ministries argues insufficient evidence supports) but these issues were not raised by Ministries in its claim for a refund from the Board.

As a prerequisite for bringing a suit for a tax refund, the taxpayer must first present a claim for a refund to the Board. (§ 6932.) (7) Issues not raised in the claim for a refund may not be raised in a suit for a refund; the suit may be brought only "on the grounds set forth in the claim." (§ 6933; *Atari, Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 672 [216 Cal.Rptr. 267]; *Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1163 [199 Cal.Rptr. 886].) "The claim for refund thus frames and restricts the issues for litigation." (*American Alliance Ins. Co. v. State Bd. of Equalization* (1982) 134 Cal.App.3d 601, 609 [184 Cal.Rptr. 674, 30 A.L.R.4th 865].) "Failure to exhaust administrative remedies before the Board is a jurisdictional procedural defect which bars court action contesting imposition of tax [Citations.]" (*Duffy v. State Bd. of Equalization, supra,* 152 Cal.App.3d at p. 1163; *Aronoff v. Franchise Tax Board* (1963) 60 Cal.2d 177, 180-181 [32 Cal.Rptr. 1, 383 P.2d 409], app. dism. 375 U.S. 451 [11 L.Ed.2d 477, 84 S.Ct. 525].)

(8) As the court explained in *Atari, Inc. v. State Bd. of Equalization, supra,* 170 Cal.App.3d at page 673: "The rationale behind the rule of confining a complaint and trial to issues raised in the claim for refund is exhaustion of remedies. [Citation.] Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the State Board of Equalization so that the Board may be afforded the opportunity to rectify any

mistake in tax collection. [Citation.] Such a rule prevents having an overworked court considers issues and remedies available through administrative channels."

The parties here stipulated: "Exhibits '1' and '2' to the complaint constituted the argument and evidence presented administratively on [Ministries's] Petition for Redetermination and Claim for Refund. The complaint herein (paragraph 12) bases [Ministries's] claim to Refund upon the grounds stated in exhibit '1' to the complaint alleging, 'In summary, it is alleged that California cannot impose a sales or use tax upon distribution of Bibles, religious books, religious tapes and other religious materials in the State of California because to do so would constitute an interference with the free exercise of religion as set forth in Article I, Section 4 of the California Constitution, and because it is a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment to the Constitution of the United States.' "

(6b) Ministries contends its statement in its claim for a refund asserting "California cannot constitutionally impose a sales tax" was sufficient to raise all constitutional issues. We disagree.

Section 6904 states, "[e]very claim shall be in writing and *shall state the specific grounds* upon which the claim is founded." (Italics added.) The only constitutional ground Ministries specified was the First Amendment; no other constitutional grounds were stated. To adopt Ministries's

position would require us to rewrite section 6904, replacing its requirement of "specific grounds," with a general denial of tax liability standard. We decline to do so.

Ministries contends it can raise these issues in this action because the Board "denied *any* exemption applied to the imposition of either the sales tax or the use tax collection liability" and, in its staff analysis of Ministries's petition for redetermination, stated "[e]xamination of petitioner's activities in California disclosed that petitioner has sufficient nexus in California to be required to register as a seller with the Board." Ministries asserts it thus raised the issues. This argument is without merit. These statements say nothing as to whether the issues were disputed; whether Ministries made any claims on these bases before the Board. Indeed, as to the nexus issue in particular, our review of the record indicates Ministries has overlooked another statement by the Board. In the decision and recommendations of the hearing officer, there is the following statement: "Counsel [for Ministries] does not argue nexus."

Ministries also argues it was not required to exhaust its administrative remedies on these issues because it would have been futile to do so and because "important questions of public policy are involved." Nothing in the record indicates it would have been futile to raise these issues. Nor do these particular issues raise "important questions of public policy," rather they raise factual questions, the determination of which is not a matter of "public policy" but a matter of evidence.

V

(9) Ministries contends the sales and use taxes offend the Ninth and Tenth Amendments of the federal Constitution.[19]

Ministries argues: "The protection of religious liberty was a keystone of the Constitution. The People reserved this area to themselves and did not grant power to the Government is this area. The following confirm this: (1) government generally is limited . . . . This is a government of the people who have 'inalienable rights endowed by their Creator';[20] (2) this area was of such importance to the People and the founding fathers . . . that it would not be an area reserved to the States, but rather would be reserved to the People; (3) the States were also limited by the people as to issues of religious freedom in States bills of rights, and (4) the fear of any implication that government could inhibit or impede these inalienable rights resulted in the Ninth and Tenth Amendments making it particularly clear.

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[19] These arguments were also not raised in Ministries's refund claim.

[20] Ministries refers to the following language attributed to The Annals of America, volume 3, page 185, H.A. Washington, II, pages 327-333, and quoted by Ministries as follows: "One of the main grievances of the anti-Federalists was the omission of a bill of rights from the Constitution. The framers had briefly discussed such an addition by rejected [*sic*] the idea for a number of reasons . . . A second, and even more pertinent objection was the belief that every man has certain natural

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"A use tax collection liability impeding the distribution of the Gospel to religious adherents is surely contrary to this history and reservation of this power over religious matters to the people under the Ninth and Tenth Amendments."

We are not surprised to see Ministries has not cited any authorities to support an argument based on the Ninth and Tenth Amendments; we find the argument singularly unpersuasive.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The United States Supreme court has explained: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exists alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 488 [14 L.Ed.2d 510, 517, 85 S.Ct. 1678], (conc. opn. Goldberg, J.).)

The Ninth Amendment has no application here because the rights at issue – free exercise of religion and

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inalienable rights that need not be enumerated. In contrast to the Federalist viewpoint, those who supported a list of fundamental rights believed that such an enumeration would provide a needed restraint on the powers of the government. In addition, the courts would have a basis for decisions when a person's rights were infringed upon . . . Thomas Jefferson . . . agreed with those who advocated a bill of rights."

separation of church and state – *are* enumerated in the Constitution, in the first two clauses of the First Amendment.

The Tenth Amendment provides: "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Like the Ninth Amendment, the Tenth Amendment has no application here. The power involved here – the power to tax – is inherently a power of the government, not of individual citizens, as the framers recognized by giving Congress the "power to lay and collect taxes." (U.S. Const., art. I, § 8.)

VI

Ministries contends "[e]vidence regarding the burdens resulting from imposition of the use tax collection liability" and "[l]etters from the Internal Revenue Service" were erroneously excluded. Ministries also asserts "[v]arious other trial court errors" occurred, including exclusion of testimony regarding the spiritual needs of physically handicapped and imprisoned adherents, the exclusion of testimony that much of the religious materials involved are not available commercially, exclusion of testimony regarding the Board's compulsion to register and pay taxes and the court's refusal to allow the pleadings to be amended.

Ministries does not specify what particular evidence or letters were excluded; does not cite where in the record this evidence was excluded, does not cite any authorities

in support of its claim of error and does not make any argument beyond its assertion error occurred. (10) "Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. [Citation.]" (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) We, therefore, decline to discuss these asserted errors.

Disposition

The judgment is affirmed.

Work, J., and Todd, J., concurred.

Supreme Court, U.S.
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No. 88-1374

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

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QUESTIONS PRESENTED

1. Whether the State of California may treat occasional religious worship services conducted in the State as a "nexus" for imposition of use tax collection liability on a religious ministry located in another state for "sales" made through the mails to adherents in California.

2. Whether the State may impose sales and use tax on the noncommercial distribution of religious materials by a religious ministry to its adherents for the purpose of advancing its religious doctrine.

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No. 88-1374

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the Court of Appeal (J.S. App. A1-A40), as modified (J.S. App. A41), is reported at 204 Cal. App. 3d 1269.

JURISDICTION

The opinion and judgment of the Court of Appeal was entered on August 29, 1988 (J.S. App. A1-A40), and the petition for rehearing was denied on September 28, 1988 (J.S. App. A41). The Supreme Court of California denied the petition for review on November 17, 1988 (J.S. App. A42). A notice of appeal was filed on February 9, 1989 (J.S. App. A43-A44). The jurisdictional statement

was filed on February 15, 1989, and the Court noted probable jurisdiction of the appeal on April 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the California Revenue and Taxation Code are set forth at J.S. App. G1-G5.

STATEMENT

Appellant, the Jimmy Swaggart Ministries,[1] is an evangelistic ministry headquartered in Baton Rouge, Louisiana. It is recognized as a religious organization under both state and federal law and is exempt from taxation on its income and property, and from inheritance and gift taxes. Tr. 26, 102-03; J.A. 11, 18-19. Its bylaws and constitution explain that the organization "is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God" and is committed to "propagating the gospel of Jesus Christ by all available means." According to the bylaws, these means "specifically include" evangelistic crusades, radio and television broadcasting, audio production and reproduction of music and preaching, writing, printing, publishing, and "any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ." J.A. 104-05.

This case involves appellant's purported obligation to pay sales tax on the distribution of religious materials

[1] Formerly known as the "Jimmy Swaggart Evangelistic Association," appellant changed its name to "The Jimmy Swaggart Ministries" on July 21, 1982. J.A. 57.

at religious services held within the State of California and to collect and remit use tax on the distribution of similar materials through the mails to its adherents in California, during the tax years 1974-81.

1. The materials in question are part of the record in this case and are available for inspection by the Court. They consist of Bibles (Exhs. 24, 33, 34), Bible study manuals (Exh. 26), printed sermons and collections of sermons (Exh. 36), audiocassette tapes of sermons (Exhs. 28, 29, 30), religious books and pamphlets, including the "Life Changing Prayer Manual" (Exh. 23), "What Does the Bible Say?" (Exh. 40), a welcome to new believers called "There's a New Name Written Down in Glory" (Exh. 17), and a discussion of war, famine, and other disasters, entitled "Is God Guilty?" (Exh. 40), and religious music in the form of songbooks, tapes, and records (Exhs. 31, 32, 37). All of these materials were prepared and produced by appellant for purposes of its ministry.

It is undisputed that all of the materials at issue in this case are directly related to religious worship or the conveyance of religious doctrine. During the tax years in question, appellant also distributed a small quantity of additional items, including mugs, t-shirts, and the like (J.S. App. A3-A4 n.3), but appellant has paid, and has not contested, the tax on these items, since they "do not have specific religious-message content" (*id.*).[2]

The record shows that appellant distributes the religious materials under dispute for the express purpose of disseminating religious doctrine, and not for commercial advantage. J.A. 102-03, Tr. 85. The Rev. James E. Rentz, an

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[2] While there was no formal calculation for purposes of this proceeding (J.A. 105, Tr. 90), appellant's best estimate of the total sales value of the nonexempt items over the eight-year period in California was $4,901, producing a tax of about $300. See appellant's Exhibit B in the reply brief before the Court of Appeal.

ordained Assemblies of God minister in charge of appellant's evangelistic crusades, testified that it is "vital that we are able to utilize these tools to fulfill what we're taught to do as ministers of the gospel" (J.A. 96. Tr. 65). As to each "representative" item admitted into evidence at trial (see J.A. 92-93, Tr. 62), the witness explained how it was related to the dissemination of religious doctrine and stated that these methods are comparable in purpose and effectiveness to more traditional forms of ministry, such as preaching and door-to-door evangelism (Tr. 67-71). As he explained, "that's the way we are spreading the gospel today, not just from the pulpit, but through other means." J.A. 66, Tr. 20. In short, appellant does not distribute these materials to make money to support its religious ministry; distribution of these materials is itself a "vital part" of its ministry. J.A. 91, Tr. 58.

These religious books and materials are made available to adherents on various terms. As is typical in the Assemblies of God denomination (in common with other religious traditions), adherents are asked to make a payment whenever possible, so that appellant "could produce other materials" (J.A. 67, Tr. 20). Both payments and donations were used entirely for appellant's religious ministry. J.A. 146, Tr. 149. Sometimes individuals send in a "order form" with a set price for a specified item. Sometimes they send in a donation and receive an item – either specified or unspecified – in return. Sometimes they receive an item without paying or giving anything. J.A. 54; J.A. 166, Tr. 169-71. See J.A. 51 ("It is the policy of [appellant] to distribute religious materials notwithstanding that the person requesting the item may not remit the stated price."). Appellant's auditor, a specialist in the taxation of nonprofit organizations, testified that "you can't distinguish between sales and contributions that have a sale or a premium involved." J.A. 160, Tr. 164; see also J.A. 161, 165-172, Tr. 165, 168-74.

2. Two related state taxes, the sales tax and the use tax, are involved in this case. The sales tax is defined by

statute as a tax on "the privilege of selling tangible personal property at retail." Cal. Rev. & Tax. Code § 6051, J.S. App. G2. The sales tax is levied on sales that take place within the State. The use tax is imposed on "[e]very person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer." *Id.*, § 6202, J.S. App. G3-G4. The use tax is called a "double filter," since it is generally imposed in cases where the retail sale was outside the jurisdiction and therefore not taxable. California law imposes a duty on the seller in most cases to collect the use tax. *Id.*, § 6203, J.S. App. G4.

The use tax collection liability in this case – 88 per cent of the total tax assessed against appellant – is based on the distribution of materials through the mails, from appellant's headquarters in Louisiana to its adherents in California. Under the Commerce and Due Process Clauses, a state may not impose use tax collection liability on an out-of-state distributor unless that distributor has a sufficient "nexus" to the state. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 554 (1977).

Appellant owns no property in California and maintains no office or regular presence in the state. Appellant does, however, conduct occasional evangelistic crusades in California and other states. These "crusades" are worship services, featuring preaching, prayer, and religious music, along with incidental "sales" of sermon tapes, Bibles, religious literature, and religious music before and after the worship services. No part of the cost of these meetings is paid by the state; indeed, in addition to the rental of the meeting halls, appellant pays the entire cost of police, fire and other necessary public services during the crusades.[3] In addition, appellant and its staff pay

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[3] In California, as elsewhere, the terms for rental of public auditoriums are set by law, usually in the form of a municipal

(Continued on following page)

taxes on their purchases of goods and services while in the state. During 1974-81, appellant conducted 23 evangelistic crusades in California, on average three per year. These crusades lasted one to three days, with one crusade lasting six days. J.S. App. A3. During three of the eight tax years – 21 of the 28 tax quarters for which there was evidence – appellant conducted *no* crusades in California at all.

In addition to the crusades, for three of the eight tax years, appellant "had a full-time representative in California counseling adherents" (J.S. App. A34). It is undisputed that this "representative" – an ordained minister – engaged in purely religious, noncommercial activity (mostly counseling and solicitation of contributions) and had no connection with the so-called "sales" at issue in

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(Continued from previous page)

ordinance. Although details vary, standard terms require the renter to pay for police, fire, first aid, custodial, insurance, and other public services. For examples from cities in which appellant conducted evangelistic crusades, see City of Anaheim Res. No. 89R-1 (Jan. 10, 1989) (approving standard form contract providing that the City will supply, "at Tenant's cost and expense," *inter alia*, "additional custodians and custodial services, guards, watchmen, personnel to staff first-aid facilities, ushers, groundscrew, City of Anaheim police officers, and firemen"); City of Bakersfield Municipal Code § 2.52.320 (1982) (adopted Aug. 1, 1960, Ordinance No. 1313, § 23(i)) ("[e]very permittee shall furnish or pay for such police and fire protection as may be required"); City of Stockton Rules and Regulations Governing the Use of Civic Auditorium, Res. No. 28,296 (renter must agree "to hold the City of Stockton . . . free and harmless from any . . . cost or expense that may arise during or be caused in any way by use of the equipment or facility"); *id.*, § 19 (renter must "employ at his expense sufficient police protection for any event as in the opinion of the Auditorium Manager and/or the Chief of Police is required to protect life and property . . . ").

this case. At no time did the Board rely on the activities of this religious counselor as a nexus for taxation, either alone or in combination with the crusades.[4]

The sales tax liability in this case – 12 per cent of the total at issue – was imposed on the distribution of religious materials during the evangelistic crusades immediately before and after the worship services. The materials distributed at the crusades are identical to materials distributed through the mails.

3. During the tax years 1974-81, appellant neither collected nor paid sales or use taxes on the religious materials at issue in this case, having been advised by counsel that such taxes would be unconstitutional (J.A.

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[4] The Board of Equalization first notified appellant of its conclusion that there was sufficient nexus to require use tax collection in a letter to appellant's general counsel, dated July 14, 1981 (reprinted at J.S. App. F3-F4). The letter stated that the Board's "Legal staff" had "concluded that, on the basis of the crusades held in California, your client has a substantial presence in the State which permits the State of California to constitutionally impose on your client the duty to collect the use tax from its mail-order purchasers." J.S. App. F4. The letter made no mention of the clergyman-counsellor. The next occasion for the Board to address the nexus issue was in its Decision and Recommendation on appellant's petition for redetermination, dated April 4, 1983 (reprinted at J.A. 17-29). That Decision made note of the fact that appellant "maintains a representative in Modesto, California" (J.A. 21), but unambiguously held that nexus had been found "on the basis of the crusades held in California." J.A. 22. Subsequent rulings of the Board were perfunctory and did not explain the basis for their conclusions. See J.A. 31 (staff analysis); J.A. 32-33 (Notice of Redetermination); J.A. 35-36 (Notice of Denial of Claim for Refund). In its original August 29, 1988 opinion, the Court of Appeal observed that "[f]rom 1978 to 1981, Ministries had a full-time representative in California counseling adherents" (J.S. App. A36), but this section of the opinion was deleted by order of the court dated September 28, 1988 (J.S. App. A41).

55). Appellant relied, in part, on a formal opinion by the Attorney General of the State of California, dated January 31, 1980, which concluded that it would be unconstitutional to tax the sales of materials by church-related schools to their students. *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980), see J.A. 14-15.

In 1981, appellee investigated appellant's activities and concluded that appellant is liable to register with the Board of Equalization and to pay sales and use taxes on the distribution of religious materials to adherents in California (J.S. App. A5). As part of that investigation, appellee sent agents to observe appellant's evangelistic crusade in Long Beach and report back to the Board. J.S. App. F3. On May 22, 1980, an official of the Board wrote a hand-written note to counsel for appellant, stating (Exh. 47, J.S. App. E1-E2):

> We must have an immediate response sending the completed applications registering your organization for its past and future sales activities in this state. Any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor.
>
> /s/ B.L. Lamb

Appellant cooperated with appellee's auditors to determine the amount of the supposed tax liability, making its records available and requesting its outside auditor to work with the Board. J.S. App. A5; J.A. 58, ¶ 4. It was not possible to determine the precise amount of use tax liability (J.A. 151, Tr. 157), mainly because sales and donations to the ministry could not be disaggregated (J.A. 171, Tr. 173). In order to proceed with this case, the parties stipulated that appellant "sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade

merchandise sales in California" (J.S. App. A5).[5] On the basis of these approximated figures, appellant was said to owe sales and use taxes of $118,294.54, plus interest of $36,021.11 and a penalty of $11,829.45, for a total of $166,145.10.

On May 3, 1982, appellant filed a petition for redetermination with the Board (J.A. 11-16). Following a hearing before a hearing officer and review by the Board, the Board remitted the penalty but otherwise affirmed the finding of liability. J.A. 32-33. Pursuant to Cal. Rev. & Tax. Code § 6902, appellant paid the tax and filed a claim for refund before the Board. J.A. 34. Following denial of the claim for refund (J.A. 35-36), appellant filed an action in Superior Court challenging the constitutionality of the tax. J.A. 37-41. The case was tried in Superior Court on May 6-7, 1986, and that court entered judgment for appellee on November 7, 1986. J.A. 215-216.

Appellant appealed to the Court of Appeal, raising a number of constitutional and statutory grounds. That

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[5] This figure was determined through negotiation between appellant's auditor and the state auditor, based on "a formula, if you will, on what potential sales and donations to California *might have been*." J.A. 148, Tr. 153 (testimony of auditor James E. Guinn) (emphasis added). The figure was based on informal, unaudited estimates of total national revenue, used for broadcast planning. From these totals were subtracted "pure donations" – about 70 per cent of the total. This left a figure for revenues generated from the distribution of religious materials. But since purchase price and donations are often intermingled (see J.A. 165-69, Tr. 169-171), it was not possible to separate out the two. Accordingly, the stipulated tax was based on "potential sales" – revenues that *could have* been a purchase price. The California portion of these national "potential sales" was then estimated on the basis of Arbitron ratings, which show that 4.39 per cent of appellant's national audience resides in California. The auditor's testimony about this process is found at J.A. 149-52, Tr. 156-57.

court rejected appellant's arguments under the Free Exercise and Establishment Clauses (J.S. App. A7-A29). The court expressly held that appellant's mode of first amendment expression, like that in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944), is "entitled to 'as high a claim to constitutional protection as the more orthodox types' of spreading one's religious beliefs." J.S. App. A10-A11, quoting *Murdock*, 319 U.S. at 110. The court found that "there is no significant difference between hand distribution and mail distribution or between printed matter and recorded religious matter." *Id.* at A10. Nonetheless, the court distinguished *Murdock* and *Follett*, confining the principle of those decisions to "a particular type of tax, a flat license tax which was unrelated to receipts, income or the administrative costs of a regulatory scheme and which acted as a prior restraint on the exercise of a constitutional right." *Id.* at A11.

In rejecting appellant's claim that administration of California's use tax would create the danger of an excessive entanglement between religious and governmental authorities, the Court of Appeal noted that the testimony in the case "tends to support [appellant's] position." J.S. App. A28. However, the court stated that "the trial court was not required to accept [the testimony]" (*id.* at A28) and concluded that "[n]either [appellant's] difficulty in establishing past 'sales' from its books due to its past accounting practices nor the requirement of future recordkeeping involve the government with an excessive entanglement with religion so as to violate the Establishment Clause" (*id.* at A29).

The Court of Appeal rejected appellant's other contentions, holding that appellant had failed to comply with the procedural prerequisites for challenging the tax under the Commerce Clause (*id.* at A30-A33), and, in its original opinion, rejecting appellant's Commerce Clause claim on the merits (*id.* at A33-A37). The Court of Appeal subsequently deleted this latter holding (*id.* at A41), leaving

only the procedural ground for its rejection of the Commerce Clause argument. The court also rejected appellant's arguments under the Ninth and Tenth Amendments to the Constitution (*id.* at A37-A39). The court observed that these claims were not raised in the claim for refund (J.S. App. A37 n.20), but nonetheless reached the merits. The court also rejected various state law claims (*id.* at A33-35, A39-A40).

Appellant petitioned for review in the Supreme Court of California, but the petition was denied. J.S. App. A42. This appeal followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Itinerant preachers and evangelists have long been the focus of conflict between the powers of the states and the free exercise of religion. In the struggle for religious freedom in the thirteen original states, the licensing, restriction, and regulation of itinerant preachers was (along with religious assessments) the most pressing issue that demanded constitutional reform. Itinerant preachers were condemned, often with good reason, for being arrogant, fanatical, intolerant, uneducated, and mercenary.[6] States passed laws restricting preaching to designated pulpits, licensing and registering preachers, and regulating the qualifications and decorum of preachers.[7] James Davenport, a fiery preacher from

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[6] See generally S. Ahlstrom, *A Religious History of the American People* 283-87 (1972).

[7] See T. Curry, *The First Freedoms* (1986), at 69-70 (New York), 99 (Virginia), 118 (Connecticut), 171 (Massachusetts); S. Cobb, *The Rise of Religious Liberty in America* (1902), at 126 (North Carolina), 174, 202-03 (Massachusetts), 273 (Connecticut), 317-18, 334-35, 344, 349-53 (New York), 390-94 (Maryland).

Connecticut, was arrested for violating the law against itinerant preaching, tried by the colonial legislature, adjudged mentally disturbed, and deported under guard to Long Island.[8] A Virginia prosecutor charged a group of Baptist ministers in these words: "May it please your worship, these men are great disturbers of the peace: they cannot meet a man upon the road, but they must ram a text of scripture down his throat."[9]

With the end of establishment and the adoption of free exercise provisions in the various state constitutions, however, the right to proclaim the gospel in unconventional, unsettling, and unpopular ways became recognized as one of the most fundamental elements of religious freedom.

A new wave of controversy arose in the 1930s and 1940s, as communities in many parts of the nation flexed their regulatory and taxing powers to ward off the new menace of Jehovah's Witnesses and other religious interlopers. As in the late colonial period, the Witnesses were said, often with reason, to be "provocative, abusive, and ill-mannered," not to mention "unpopular, annoying, or distasteful." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115-16 (1943); see *id.* at 166-82 (Jackson, J., dissenting). Itinerants were particularly vulnerable, since they have no established base of support in the community, may be perceived as alien or disruptive, and often threaten competition with the community's own established religious institutions.

The cases of this era differed from the late colonial experience only in that burdensome taxation was added to licensure as a means of repressing speech. Taxation proved a potent weapon. In religion, as in federal-state relations, the power to tax is the power to destroy. See

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[8] Ahlstrom, *supra* note 6, at 285.

[9] Cobb, *supra* note 7, at 113.

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). In *Murdock*, the city authorities used enforcement of a burdensome (though facially nondiscriminatory) tax as the means to drive the Witnesses from their town. In attempting to justify their actions, the authorities seized upon "the fact that the religious literature is distributed with a solicitation of funds." *Id.* at 110. This, they contended, took the Witnesses' activities out from the protection of the First Amendment and into the realm of the commercial. But this Court struck down this "new device for the suppression of religious minorities" (*id.* at 115), holding that the distribution and "sale" of religious materials by evangelists "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion." *Id.* at 109. And in *Follett* v. *McCormick*, 321 U.S. 573 (1944), the Court extended the principle of *Murdock* to the taxation of nonitinerant preachers in their own home towns.

After *Murdock*, the states acquiesced in a "hands-off" policy toward itinerant evangelists, generally imposing on them only those burdens that were strictly related to actual impacts on the communities in which they preached. For the most part, this meant that the religious activities of evangelists were not taxed, even though some part of their missionary endeavors consisted of the distribution of Bibles, tracts, and other literature for payment. Most states passed specific exemptions in their tax codes; others reached the same result at the administrative level.

Appellee, the State of California, however, sought to impose on appellant, an evangelistic ministry headquartered in Louisiana, liability for sales or use taxes on religious materials distributed to adherents within the State. Although appellant distributes religious materials to adherents in all 50 states, California is the only state to

assert jurisdiction to tax these "sales."[10] Imposition of sales and use tax liability in this case violates appellant's constitutional rights in two fundamental ways.

I. First, appellee has asserted authority to impose use tax collection liability against appellant, which had no regular or continuous presence in California and owned no property there, on the basis of appellant's occasional evangelistic crusades in the State. This violates the Commerce and Due Process Clauses, as interpreted in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967). Moreover, since the amount of the use tax liability is unrelated to the size or frequency of the crusades, this has the effect of imposing a flat penalty on religious speech, association, and worship, in plain violation of the First Amendment. We contend that "nexus" for purposes of use tax collection liability must be based on something other than meetings and activities of a religious and noncommercial nature. This point, which involves straightforward application of current Supreme Court precedent, is dispositive of 88% of appellant's alleged tax liability.

II. Second, both sales and use taxes at issue in this case are imposed directly on religious activity: the distribution of Bibles, religious tapes and pamphlets, and religious music by a religious body for the purpose of advancing its religious teaching. Under *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944), as well as more general principles of the Religion Clauses, such taxes are unconstitutional. In *Follett*, the Court held that "[t]he exaction of a tax as a

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[10] One other state (Louisiana) has begun the audit process and presumably will impose tax liability if the decision below is affirmed, and others likely will follow suit. While expressly preserving a claim of constitutional immunity, appellant has consented to payment of sales tax to East Baton Rouge parish on items sold at its bookstore there, rather than litigate through the appellate courts over the small sums involved.

condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint." 321 U.S. at 577. In *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890 (1989), however, a three-Justice plurality cast doubt on the continued vitality of *Murdock* and *Follett*. It is necessary, therefore, to reassess the principle of *Murdock* and *Follett* in light of current interpretation of the Religion Clauses. We contend that to require a religious body to pay tax on the distribution of religious materials to its adherents would violate the First Amendment, and thus that the principle of *Murdock* and *Follett* should be reaffirmed.

Our argument in support of this proposition will be divided into four parts. First, immunity of religious transactions between a religious body and its adherents from tax is an integral part of this nation's separation of church and state. While many taxes that affect religious organizations are permissible, the dissemination of religious doctrine is constitutionally protected; it may no more be taxed by the state than it may be subsidized by the state. Second, imposition of a tax on the dissemination of religious doctrine is a clear burden on the free exercise of religion, and is not outweighed by any compelling governmental purpose. In this respect, the immunity of religious bodies from tax on activities relating to worship and evangelism must be distinguished from allowing individuals to deduct the cost of their religious adherence from their income tax. The latter can be seen as a form of subsidy, while the former simply avoids imposing a burden.

Third, the administrative burden of a sales and use tax is inhibiting (if not prohibitory), and the subjective nature of determinations that must be made under the sales and use tax law creates the potential for an excessive entanglement between religious and governmental authorities. Fourth, the Establishment Clause concerns that evidently underlay the *Texas Monthly* plurality's decision to reconsider the wider implications of *Murdock* and

Follett do not, upon careful analysis, require abandonment of those long-standing precedents. Rather, *Murdock* and *Follett* fit comfortably within the doctrinal structure of both the Free Exercise and the Establishment Clauses.

ARGUMENT

I. The "Nexus" Between a Distributor of Religious Materials and the Taxing State May Not Be Based On Occasional Meetings and Activities of a Noncommercial, Religious Nature

Under the Commerce and Due Process Clauses, a state may not impose use tax collection liability on an out-of-state distributor unless that distributor has a sufficient "nexus" to the state. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 554 (1977); *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967). In this case, the Board of Equalization has asserted jurisdiction to tax on the basis of 23 evangelistic crusades appellant conducted in the State during 1974-81.[11] These crusades lasted from one to three days (one crusade lasted six days), and consisted of preaching, singing, prayer, and other religious speech, along with incidental "sales" of sermon tapes, Bibles, religious literature, and religious music. Only about 12% of the sales and use tax liability at issue in this case stemmed from sales at these crusades. The remainder was assessed on the distribution of religious materials from appellant's headquarters in Louisiana to adherents in California through the mails. For purposes of the argument in this section only, we do not contest the constitutionality of the *sales tax* on the distribution of materials in California during the evangelistic crusades. We do, however, contend that the state may not use the evangelistic crusades as a basis for imposing *use tax*.

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[11] See note 4, *supra*.

Even if appellant's activities were purely commercial, these contacts would be insufficient to establish nexus under the Commerce and Due Process Clauses.[12] Every case in which this Court has found nexus involved some continuous substantial presence, such as sales offices (*National Geographic Society, supra*), stores (*D.H. Holmes Co.* v. *McNamara*, 108 S. Ct. 1619 (1988)), or a permanent sales representative (*Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, 483 U.S. 232, 249-51 (1987)). This Court has never treated episodic contacts with a State as a sufficient basis for imposing use tax collection liability. See *National Bellas Hess, supra*; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954). Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317 (1945) (nexus for *in personam* jurisdiction must be based on "continued and systematic" activities in the state).

Indeed, for most of the period involved in this case, there was no nexus of any sort between appellant and the State of California that might justify imposition of use tax collection liability. During three of the eight years in question – 21 of the 28 tax quarters for which there was evidence – appellant conducted *no* crusades in California. At most, appellant's contacts with the State would justify tax liability for seven quarters out of eight years. More fundamentally, these facts illustrate the difficulties that

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[12] The Superior Court and the Court of Appeal held that appellant was procedurally barred from pursuing constitutional claims other than those arising under the First Amendment, on the ground that they had not been presented in the claim for a refund. J.S. App. A30-A33; Tr. 12-14, 231. However, the State Board of Equalization considered and ruled on the Commerce and Due Process Clause issue (J.S. App. F3-F4; J.A. 21) and appellant raised the issue both before and after trial in the Superior Court (Tr. 6-12, 216-225; Appellant's Post-Trial Memorandum, at 1-14), and again in the brief before the Court of Appeal (at 39-49) and the Petition for Review in the California Supreme Court (at 25-27).

would be created if occasional contacts were treated as a tax nexus. Does one day's presence in the state warrant taxation for the entire quarter? For the tax year? For all time? Only a requirement of a sustained, continuous presence within the state will provide an objective, understandable standard for determining when a state can impose tax liability on an out-of-state party.

Even if the quantity of these contacts were sufficient under the Commerce and Due Process Clauses, however, the First Amendment prohibits the State from treating the conduct of religious services as the predicate for taxation. Appellant's evangelistic crusades are an age-old form of religious speech and worship, highly protected under the First Amendment. This Court's description of the conduct in *Murdock* applies equally to appellant's activity here: "It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting." 319 U.S. at 109. Indeed, the evangelistic crusades *are* revival meetings. It would seem obvious that appellee could not impose a $100,000 "tax" or "fine" on appellant for the "privilege" of conducting these religious services. Yet that is precisely the effect of the use tax collection liability in this case.

If it were not for the crusades, appellant would be free from tax on its distribution of materials through the mails. To impose tax liability for holding evangelistic meetings exacts a penalty on the exercise of rights in plain violation of the Constitution. See *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (a "fine imposed against appellant for her Saturday worship" would be a "burden upon the free exercise of religion"). If the states are permitted to impose tax liability on account of meetings of this sort, religious organizations that distribute religious materials through the mails will be forced to decide, in each instance, whether it is "worth" the price to conduct

religious services in a new state. The "pressure . . . to forego [the religious] practice is unmistakable." *Id.*[13]

In contrast to the sales tax liability, which is roughly proportional to appellant's crusade "sales" activity, the use tax bears no relation whatsoever to the size or frequency of appellant's crusades in California. The amount of the tax is based on appellant's distribution of religious materials from Louisiana to its adherents in California – approximately $104,000. The use tax liability in this case (even excluding the administrative cost, which is substantial) was *over seven times as large* as the sales tax due on the distribution of materials at the crusades; indeed, the use tax liability comes to almost one half of the total value of those materials, which totalled only $240,560.[14] Use of the crusades as a nexus for the imposition of use tax liability is thus functionally identical to the flat licence fee struck down in *Murdock* (though here the inhibitory impact is on the holding of evangelistic crusades rather than on the distribution of religious literature *per se*).

That appellant conducted some "sales" of religious materials at the crusades, and thereby received some revenue, does not change the analysis. As in *Murdock*, appellant's "sales of religious literature were merely incidental to their primary evangelical mission" (*Texas Monthly*, 109 S. Ct. at 904 n.10). The mere fact that some "sales" took place does not turn the crusades into a

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[13] This further distinguishes the present case from *National Geographic, supra*. In *National Geographic*, the nexus was the operation of two offices for the sale of advertising in a magazine. That was commercial activity. Here, the nexus is the conduct of evangelistic crusades and other religious activity, which is not commercial in nature, but deserving of high constitutional protection. *Murdock*, 319 U.S. at 110.

[14] This might be compared to the numbers in *Murdock*, where cumulative license fees could have cost $45 per month, on average monthly sales with a total value of $65. *Texas Monthly*, 109 S. Ct. at 904 n.10.

commercial enterprise or deprive them of their constitutional protection.

Imposition of use tax collection liability on out-of-state businesses "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman* v. *Hewit*, 329 U.S. 249, 253 (1946); see *National Bellas Hess*, 386 U.S. at 756 (citation omitted) ("the 'simple but controlling question is whether the state has given anything for which it can ask return' "). During the crusades, appellant paid the full cost of rental of facilities and the police, fire, insurance, and related services for the crusades; and its adherents and employees paid taxes on the hotel rooms, meals, fuel, transportation, and telephones they used as a result of their attendance. See note 3, *supra*. If anything, states and local jurisdictions profit economically from conventions and similar events; that is why they compete to attract them.[15] Appellant's mail distribution of religious materials itself imposes no costs on the State that would warrant tax liability (*National Bellas Hess*, *supra*). Imposition of use tax liability under the circumstances of this case thus has a profound chilling effect on the First Amendment right to conduct religious meetings, and is unwarranted by the sole permissible purpose of the tax. We contend that to constitute "nexus" for purposes of the Commerce Clause, an out-of-state distributor's activities within the state must be continuous and sustained, and for purposes of the First Amendment must be based on something other than worship services and related activities of a religious and noncommercial nature.

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[15] Moreover, if this Court were to reject our argument for immunity from sales tax (Part II, *infra*), the collection of sales tax on the distribution of materials at the crusades would more than recompense the State for its costs, if any, from appellant's activities. There could be no justification for imposing the additional burden of use tax collection.

II. The First Amendment Prohibits Taxation of the Distribution of Religious Materials By Religious Bodies For the Purpose of Spreading Their Ideas

The lower court held (J.S. App. A10-A11), and it is not disputed, that appellant distributes the religious materials at issue in this case in order to spread the gospel of Jesus Christ as appellant understands it. The only materials at issue are books, pamphlets, tapes, and records with specific doctrinal or worship-related content. As in *Murdock*, "[t]he integrity of this conduct or behavior as a religious practice has not been challenged." 319 U.S. at 109. As in *Murdock*, appellant collects a payment for the religious materials it distributes, wherever possible, to defray the costs of the ministry. But, no less than in *Murdock*, "[o]n this record it plainly cannot be said that [appellant] w[as] engaged in a commercial rather than a religious venture" (*id.* at 111), and the lower court did not attempt to justify imposition of tax liability on that basis. As in *Murdock*, the "selling activities" of appellant are " 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their [faith].' " *Id.* at 112 (citation omitted).

Whether a state may impose a tax on transactions of a religious nature between an evangelistic ministry and its adherents has become an unsettled question in the wake of this Court's recent decision in *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890 (1989). In *Texas Monthly*, a three-Justice plurality disavowed what it called "unnecessarily sweeping statements in *Murdock* v. *Pennsylvania* and *Follett* v. *McCormick*" (109 S. Ct. at 903). In those cases, along with *Jones* v. *Opelika*, 319 U.S. 103 (1943), the Court had held that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For . . . 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.' " *Follett*, 321 U.S. at 577, quoting

Murdock, 319 U.S. at 112 (citations omitted).[16] The Court distinguished between commercial and religious distribution of literature, holding that the latter is entitled to exemption. 319 U.S. at 111; see 109 S. Ct. at 904 n.11.[17] In a dissenting opinion adopted by the Court on rehearing in *Jones*, Justice Murphy stated that "[t]he exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes." *Jones* v. *Opelika*, 316 U.S. 584, 620 (1942), adopted by the Court on rehearing, 319 U.S. 103, 104 (1943). Thus, when the distribution of books and other literature is carried on as part of an evangelistic enterprise (rather than as a commercial enterprise) the transaction is not subject to the state's taxing power.

The other six Justices in *Texas Monthly* either dissented or filed concurring opinions on narrower grounds, leaving the continued vitality of *Murdock* and *Follett* to another case. This is that case.

The *Texas Monthly* plurality based its conclusion that application of the tax in that case would not violate the Free Exercise Clause on the fact that "the State has adduced no evidence that the payment of a sales tax by

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[16] The Court also stated that "the 'sale' of religious pamphlets by itinerant evangelists was a form of *preaching*, and that imposing a license or occupation tax on such a preacher was tantamount to exacting 'a tax from him for the privilege of delivering a sermon.' " 109 S. Ct. at 903 (quoting *Murdock*, 319 U.S. at 109, 112, and *Follett*, 321 U.S. at 577) (emphasis in original).

[17] The principle of *Murdock* does not apply to for-profit activities, even when those activities involve First Amendment-protected speech. *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 586-87 n.9 (1983); see *Breard* v. *Alexandria*, 341 U.S. 622 (1951). Thus, the sale of a Bible or other religious book by a commercial bookstore would not be exempt.

subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity." 109 S. Ct. at 901. The lack of evidence is probably attributable to the fact that the only parties to the case were a secular publisher and a government official, and there were no *amici curiae* to explain the impact on religious bodies. Whatever the factual weaknesses in the *Texas Monthly* litigation, the plurality did not disavow the fundamental legal principle of *Murdock* and *Follett*: that even "equal treatment of commercial and religious solicitation" might in some circumstances "result in an unconstitutional imposition on religious activity warranting judicial relief." 109 S. Ct. at 904. Mere facial neutrality does not exhaust the protections of the First Amendment.

Evidence in the record in this case documents that imposition of sales and use tax liability on appellant's evangelistic efforts would impose an "undue burden" (*id.* at 905) and "inhibit religious activity" (*id.* at 901). While free exercise claims must be evaluated on a case-by-case basis, we believe that the facts of this case confirm the wisdom of *Murdock* and *Follett*, and that those well-established precedents should not be disturbed.[18]

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[18] As Justices Blackmun and O'Connor have recently pointed out, the Establishment Clause demands that any exemption, whether statutory or constitutional in origin, must be broad enough to encompass the full range of views on issues of religious import. Thus, exemptions must be extended "not only [to] religious literature distributed by a religious organization but also [to] philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly*, 109 S. Ct. at 906 (Blackmun, J., concurring). The constitutional protections for "religion" that we invoke here should be understood in that light. So understood, any immunity for the dissemination of "religious" doctrine will avoid the constitutional defect of the Texas statute identified by the concurring Justices in *Texas Monthly*.

A. The Government May Neither Tax Nor Subsidize the Dissemination of Religious Doctrine

Immunity of religious transactions between a religious body and its adherents from tax is an integral part of the scheme of separation of church and state that evolved in this country in the early years of the republic. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Walz* v. *Tax Commission*, 397 U.S. 664, 676-77 (1970).

Worship and the dissemination of religious doctrine are outside the jurisdiction of civil authorities, whether to assist or to burden, whether to aid or to tax. Of course, the separation of church and state is not, and could not be, absolute. Insofar as churches[19] or other religious bodies participate in the secular sphere, performing secular services or engaging in secular transactions, they can (and sometimes must) be treated in much the same way as their secular counterparts, both for the receipt of aid (*e.g.*, *Hunt* v. *McNair*, 413 U.S. 734 (1973)), and for the imposition of burdens (*e.g.*, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985)). But churches are barred from receiving direct financial assistance from the government for the support of their worship and their dissemination of doctrine. *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2580-81 (1988); *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 385 (1985). The corollary is that worship and the dissemination of religious doctrine are also immune from taxation. As this Court has observed, "The hazards of churches supporting government are hardly less in

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[19] We use the term "church" here in its broad sense as a religious organization dedicated to worship and the dissemination of religious doctrine. The term is not confined to institutions of the Christian religion or to houses of worship.

their potential than the hazards of government supporting churches." *Walz*, 397 U.S. at 675. The combination of ineligibility for assistance in their dissemination of religious doctrine and immunity from tax on the same achieves a rough neutrality toward religion.

Appellant's activities at issue in this case are purely religious and doctrinal in nature. It is difficult to imagine any activity so close to the core of protected religious autonomy as the dissemination of religious doctrine by a religious body to its adherents. The transactions between appellant and its adherents have no secular impact. They impose no "costs" on the state for which the state might be entitled to be recompensed, and they impart no secular "benefits" to the state for which the state would be entitled to offer subvention. They are purely religious, outside "[the] cognizance of Civil Government." See J. Madison, *Memorial and Remonstrance*, ¶ 8, reprinted at 330 U.S. 63, 68.

We do not contend that the state is barred from all forms of taxation that may affect religious organizations. It is free to tax the income of individuals, whether clergy (*Murdock*, 319 U.S. at 112), or laymen (*United States* v. *Lee*, 455 U.S. 252 (1982)), since individuals in their capacity as citizens or residents are equal participants in the burdens and benefits of public life. It is free to tax transactions involving secular goods, whether purchased by the church (*Covenant Community Church* v. *Lowe*, 698 S.W.2d 339 (Tenn. 1985), *app. dismissed*, 475 U.S. 1078 (1986)) or produced by the church and sold on the market (*Tony & Susan Alamo Foundation* v. *Secretary*, 471 U.S. 290 (1985)).[20] This is the rationale of the unrelated business tax provision of the Internal Revenue Code. 26 U.S.C. 511-513. The state is also free to impose taxes and fees to defray specific and documented costs imposed upon the

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[20] *Alamo Foundation* involved minimum wage regulation of a church's commercial activities, rather than a tax, but the principle would equally apply to a tax.

government by the exercise of First Amendment rights. *Cox* v. *New Hampshire*, 312 U.S. 569, 577 (1941) (upholding fee for the costs of a religious procession through public streets); *Gilfillan* v. *Philadelphia*, 637 F. 2d 924, 933 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (requiring church to pay the extraordinary costs entailed by a papal mass on public property). And, of course, the government may employ its taxing power in ways that burden free exercise rights if it has a compelling governmental justification, such as the eradication of racial discrimination in education. *Bob Jones University* v. *United States*, 461 U.S. 574, 604 (1983). But, absent a compelling governmental justification, the limit of the state's power is the essentially religious core of a church's activities – the religious interactions between a religious organization and its adherents. Within this sphere of constitutionally protected activity the state must leave the church alone: autonomous and unmolested. See *Corporation of Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2871-72 (1987) (Brennan, J., concurring).

Across a wide spectrum of free exercise issues involving the regulation of religious organizations, the courts have drawn a distinction between the core religious functions of religious organizations – particularly the dissemination of religious doctrine – and more secular aspects of their operations.[21] For example, laws

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[21] Some scholars have identified this principle with the Establishment Clause, noting that intrusive regulation of religious entities can "inhibit religion" in violation of the second part of the *Lemon* test, and cause "excessive entanglement" in violation of the third part. See, *e.g.*, Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984). Others identify this principle with the Free Exercise Clause. See Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev.

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prohibiting employment discrimination have been applied to such positions in religious organizations as an editorial secretary in a religious publishing house,[22] non-ministerial support staff in a theological seminary,[23] and a secular teacher in a religiously-affiliated college,[24] but cannot be applied to clergy and other church officials responsible for "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[25] Similarly, labor laws can be applied to nurses, maintenance and storeroom employees, and child care workers in religious agencies,[26] but not to employees responsible

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1373, 1378-88, 1392-94 (1981). This is an instance in which the two Religion Clauses work together in perfect harmony, the one preventing excessive conflict and overlap between governmental and religious authorities, the other giving the widest latitude for the exercise of differing views of corporate religious life.

[22] *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982).

[23] *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1981).

[24] *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

[25] *Rayburn* v. *General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); see *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). Faculty and administrators of a theological seminary (but not support staff) were held exempt in *Southwestern Baptist*, 651 F.2d 283-85.

[26] *St. Elizabeth Community Hospital* v. *NLRB*, 708 F.2d 1436 (9th Cir. 1983) (nurses); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (maintenance, storeroom, and childcare workers).

for inculcation of religious doctrine – even including lay teachers in parochial schools.[27] States have been permitted to regulate the health, safety, and sanitation of residential children's homes operated by religious organizations,[28] but when the regulation comes to affect the religious atmosphere and training in the home it is unconstitutional.[29] Moreover, while free exercise *requires* that the government refrain from intrusion into the core religious activities of religious organizations, the establishment clause *permits* the government to exempt religious organizations from regulation of secular aspects of their operations where it would be difficult or entangling to disaggregate the religious from the secular.[30] This case involves core religious activity. *Murdock*, 319 U.S. at 108-09.

The same line has been drawn when the issue is taxation. For the most part, it has been drawn by statutes and state constitutions, whose "authors . . . [perceived] the latent dangers inherent in the imposition of . . . taxes." *Walz*, 397 U.S. at 673. Table 5 of Appendix A to this brief is a collection of state provisions protecting

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[27] *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). *Catholic Bishop* and its progeny were decided as a matter of statutory construction, but the Court reached that construction in order to avoid conflict between the statute and the demands of the First Amendment. *Id.* at 499-501.

[28] *Kansas* v. *Heart Ministries, Inc.*, 227 Kan. 244, 607 P. 2d 1102, *app. dismissed*, 449 U.S. 802 (1980).

[29] *Tabernacle Baptist Church* v. *Conrad*, Civ. No. 79-149 (D. S.C. Oct. 27, 28, 1980) (unpublished opinion), quoted and discussed in Esbeck, *supra* note 21, 41 Wash. & Lee L. Rev. at 412-13.

[30] *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862 (1987).

religious activities from sales and use taxes;[31] undoubtedly, other states have reached similar results through administrative action and prosecutorial discretion. Although there are numerous variations, the pattern of legislative activity accords with our analysis here: the closer one comes to the internal, religious functions of worship and the dissemination of doctrine, the more likely it is that states will recognize churches as immune from their taxing power.

Moreover, as *Murdock* and *Follett* indicate, there is a constitutional core that underlies these legislative enactments. The taxing power, no less than the police power, is subject to the constraints of the First Amendment. In the (relatively rare) cases in which state taxing authorities have overstepped the line and asserted taxing jurisdiction over religious activities internal to the church, the state and lower federal courts have not hesitated to invalidate them under the First Amendment.[32] Even in California –

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[31] Congress likewise has a longstanding practice of such exemptions. See, *e.g.*, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (holding that churches, including church-owned schools, are exempt from unemployment tax); 26 U.S.C. 511, 513 (taxing profits on commercial activities of churches, but not on profits from activities "related to" the religious mission of the church); 19 U.S.C. 1202, Pt. 4, ¶ 850 (exempting religious bodies from customs duties on religious articles); ch. 17, 6 Stat. 116 (1813) (remitting duties paid on the importation of plates from printing Bibles); ch. 91, 6 Stat. 346 (1826) (remitting duties paid on the importation of church vestments, furniture, and paintings); ch. 259, 6 Stat. 600 (1834) (remitting duties paid on the importation of church bells).

[32] See, *e.g.*, *Stajkowski* v. *Carbon County Bd. of Assessment*, 541 A.2d 1384 (Pa. 1988) (invalidating occupation tax as applied to a priest); *State* v. *Van Daalan*, 11 N.W. 2d 523 (S.D. 1943) (striking down sales tax as applied to itinerant evangelists); *International Society for Krishna Consciousness, Inc.* v.

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until this case – the sale of religious materials by an evangelistic ministry was held constitutionally immune from sales tax, in reliance on *Murdock. Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985); see also *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980), J.A. 14-15.

There is no compelling justification for redrawing the line between taxable and protected activity. The state should not be permitted to use the exercise of First Amendment rights as an occasion for raising general revenues. *Cox* v. *New Hampshire*, 312 U.S. at 577 (upholding fee on religious parade on the ground that it was "not a revenue tax"). A worshipper could not be taxed for going to church or a preacher for preaching, even if these activities were comprehended within a broadly "neutral" category of taxable activities. And surely, if sermons cannot be taxed, neither can audiotapes of sermons or reprints of sermons. That a religious activity may involve the transfer of money does not remove its constitutional protection. "[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise,"

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Commonwealth, 610 S.W.2d 910, 912 (Ky. App. 1980) (proselytizing and soliciting, not constituting a commercial "sale," is "protected and privileged by the First Amendment"); *State* v. *Meredith*, 197 S.C. 351, 355, 15 S.E.2d 678, 679 (1941) (construing state statute not to apply to "sale" of religious books and pamphlets when it is "merely incidental to the chief purpose of the defendant, which was the spreading of his religion"); *State* v. *Woodruff*, 135 Fla. 84, 13 So.2d 704 (1943) (same); *People* v. *Barber*, 289 N.Y. 378, 46 N.E.2d 329 (1943) (same); *California* v. *Grace Brethren Church*, No. CV 79-93 MRP (C.D. Cal. Apr. 6, 1981) (unpublished opinion reproduced in Jurisdictional Statement), *remanded on jurisdictional grounds*, 457 U.S. 393 (1982) (imposition of unemployment tax on religious schools violates entanglement principle).

this Court commented in *Murdock*. "If it did, then the passing of the collection plate in church would make the church service a commercial project. . . .[A]n itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." 319 U.S. at 111.

Our constitutional system of separation between church and state comes down to this: in their core religious functions, religious bodies must be autonomous and independent of the government. They may be neither aided nor penalized, subsidized nor taxed. They must be left alone. The dissemination of religious doctrine by churches and other evangelistic ministries is ineligible for aid by the government, and should be equally immune from taxation.

B. Taxation of the Dissemination of Religious Materials by an Evangelistic Ministry Imposes a Substantial Burden on the Free Exercise of Religion, Without Sufficiently Compelling Justification

This case involves the purported power of the state to tax the religious activities of an evangelistic ministry. It bears emphasis that a tax on religious activity (as distinguished from a refusal to subsidize) is a burden on free exercise, perhaps the quintessential burden. See *Murdock*, 319 U.S. at 108 ("It could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional"). A tax on the dissemination of religious doctrine will discourage this form of evangelism relative to other uses of time and resources. It adds a substantial additional cost to evangelistic efforts, and on the margin will prevent some evangelistic activity from taking place. As this Court observed in *Murdock*, "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . .Those who can tax the exercise of this religious practice can make its

exercise so costly as to deprive it of the resources necessary for its maintenance." 319 U.S. at 112.

By contrast, refusal to allow a religious adherent to deduct the cost of obtaining a religious benefit is not a burden on free exercise because it does not make the exercise any more costly than it would be in the absence of government. This case is therefore distinguishable from *Hernandez* v. *Commissioner of Internal Revenue*, Nos. 87-963 & 87-1616 (slip op., June 5, 1989), which involved an individual's attempt to deduct from gross income a payment made to the Church of Scientology for religious services, called "auditing" and "training." The Court observed:

> Any burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent.

Slip op. 17. The Court's decision in *Hernandez* underscores the distinction between a religious institution's exemption from tax and an individual taxpayer's eligibility for tax deductions from income subject to tax. Institutional immunity from taxation is a form of state noninvolvement with, or separation from, religion. Tax deduction for contributions is a form of indirect subsidy of religious activity, analogous to a "matching grant" from the government.[33]

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[33] For lucid explanations of the economic substance of exemptions and deductions by a noted tax authority, see Bittker, *Churches, Taxes and the Constitution*, 78 Yale L. J. 1285 (1969) (on tax exemptions), and Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 Tax L. Rev. 37 (1972) (on the deductibility of contributions).

Consider a religious adherent who wishes to transfer $100 to a religious body, receiving a spiritual benefit (whether tangible or intangible) in return. Assume that the relevant income tax rate is 10 percent, and the relevant sales or use tax rate is also 10 per cent. The "cost" to the adherent of obtaining the spiritual benefit, independent of any tax consequences, is $100. If the transfer is treated as deductible under Section 170 of the Internal Revenue Code, then the adherent is excused from tax on $100 that he has earned in the workplace, and the "cost" of his obtaining the spiritual benefit, net of taxes, is only $90. On the other hand, if the state imposes a sales, use, or services tax on the transfer, then the adherent must pay $10 in taxes, and the "cost" of obtaining the spiritual benefit is $110. Thus, the difference between *Hernandez* and this case is the difference between disallowing a subsidy and imposing a burden.[34]

Since a tax on the noncommercial distribution of religious materials by a religious organization is a burden on free exercise, it follows that it can be justified only by a compelling governmental purpose. The mere need of a state for additional general revenue is not sufficient. *Cox* v. *New Hampshire*, 312 U.S. at 577; *Jones* v. *Opelika*, 316 U.S. at 620, adopted on rehearing, 319 U.S. at 104. If it were, the states could tax attendance at worship services or

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[34] The difference between tax exemption and eligibility for tax deductible contributions is illustrated graphically by the Internal Revenue Code's provisions on lobbying by charitable organizations. The congressional policy is not to subsidize political lobbying with tax funds. Accordingly, an organization that engages in substantial lobbying is excluded from receipt of tax deductible contributions under Sections 170, 501(c)(3), and 501(h) of the Code. But such an organization (provided it meets the other criteria) remains exempt from taxation on its own income, under Section 501(d). Thus, Congress refuses to subsidize political speech, but also declines to tax it. See *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983).

contributions to the church, as readily as they can tax the dissemination of religious doctrine. States always need revenue, but the Constitution places some sources of revenue beyond their grasp.

In *United States* v. *Lee*, 455 U.S. 252, 260 (1982), this Court stated that there is a "broad public interest in maintaining a sound tax system," noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* See *Hernandez*, slip op. 18. The government had a legitimate fear that acceding to the plaintiffs' argument in *Lee* would lead to ever-widening claims for exemption by other taxpayers (such as those who refuse to pay the proportion of tax that goes to war-related activities), since there was "no principled way . . . to distinguish" one such claim from another. 455 U.S. at 260. The State in this case can have no comparable concern. Churches and evangelistic ministries have been immune from sales and use taxes on their dissemination of doctrine since the first passage of those taxes – and from other taxes directly bearing on religious practice for still longer – and there have been no dire effects on "the broad public interest in maintaining a sound tax system." *Id.* at 260. Their immunity from taxes of this sort is based on their autonomous status, not on the vagaries of their doctrine. Actual experience makes the rationale of *Lee* inapplicable to this context.

Moreover, even if a state's need for increased general revenues is compelling in the abstract, imposition of a burden on free exercise is not justified unless "it is the least restrictive means of achieving" that compelling governmental purpose. *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981). The State of California has any number of ways to raise revenue without imposing burdens on the dissemination of religious doctrine. As the California courts recognized – until this case – "[t]he interest of California . . . is the raising of revenue. That interest alone, however, cannot justify a privilege or occupation

tax as a condition of engaging in protected activity if there is 'an alternative means of achieving the same interest without raising concerns under the First Amendment.' " *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985), quoting *Minneapolis Star* v. *Minnesota Comm'n of Revenue*, 460 U.S. 575, 586 (1983).

It is easy to understand why the State may prefer to tax the itinerant evangelist – ever a popular target – but it is precisely choices of that sort that the First Amendment is designed to protect against.

C. The Administrative Burden of Sales and Use Tax Collection Would Be an Undue Imposition on Appellant's Free Exercise of Religion and Would Entail an Excessive Entanglement Between Religious and Governmental Authorities

With all its state and local variations, sales and use taxes are probably the most complicated and burdensome of all taxes to collect. Imposition of this responsibility on an evangelistic ministry would lead to recurring, intricate, and intrusive interactions between religious and government officials. Such impositions raise problems under both the Free Exercise and the Establishment Clause – Free Exercise because the burden on protected activity is inhibiting (if not prohibitory), and Establishment because it is deeply entangling.

Sales and use taxes are imposed by 46 different states[35] and 6,955 smaller taxing jurisdictions (as of 1988),[36] including cities, counties, school districts, development districts, transit authorities, and overlapping

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[35] See Table 1 in Appendix A to this Brief for a listing of all state sales taxes, with relevant statutory and administrative citations. The number 46 includes the District of Columbia.

[36] Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* (1989 ed.), Vol I., at 59.

taxing districts of every description. Each of these states and many of the 6,955 other jurisdictions can impose a different percentage of tax,[37] and may define the relevant "sale" in a different fashion.[38] Each of these states and many of the local jurisdictions have their own registration and filing requirements,[39] and their own rules for notifying the purchaser of the tax.[40] In order to comply, appellant would have to identify which taxing jurisdictions each person to whom it distributes religious materials resides in (a fact that will not be immediately apparent just from the address, since local taxing jurisdictions overlap zip code zones), and what the applicable tax laws are for that jurisdiction (J.A. 144, Tr. 141). After determining the requirements of these 7,001 jurisdictions, appellant would then be required to obtain and complete the necessary forms,[41] and would be subject to audits and

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[37] See Table 2 in Appendix A to this Brief for a listing of sales tax rates for each state and for sample local jurisdictions.

[38] See Table 3 in Appendix A to this Brief for a chart of regulations relating to sales and use tax by state, including license requirements (including fees), type of criminal sanctions, legal incidence of tax (on seller or buyer), whether seller is required to pass tax on to buyer, and whether the tax must be separately stated or advertised.

[39] Table 4 in Appendix A to this Brief is a chart of the filing requirements by state.

[40] This presents particularly difficult problems for a nationwide ministry, since advertising – including radio, television, and cable advertising – would have to be specially tailored to each jurisdiction to satisfy different and in some cases mutually inconsistent requirements. Information about these requirements is summarized in the last column of Table 3.

[41] The California form is reproduced at J.A. 174.

audit inquiries.[42] These burdens were documented in detail in trial court for purposes of appeal, by means of an offer of proof (J.A. 207-12). As this Court has observed:

> [I]f the power of [one state] to impose tax burdens upon [a mail order distributor] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if [one state] can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle [the distributor's] interstate business in a virtual welter of complicated obligations to local jurisdictions. . . .

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753, 759-60 (1967).

The complexities of collecting sales and use tax for multiple jurisdictions create an enormous burden on a national evangelistic ministry. Appellant's auditor, a C.P.A. with a specialty in tax exempt organizations (with 230 exempt organizations as clients), testified that to comply with the law would require appellant "to hire a staff of programmers and start writing a program to do all of this, a massive expenditure of time and money." (J.A. 169, Tr. 172). Appellant proffered evidence that it would require a total capital outlay of over $2 million for computer software programs alone. J.A. 211. The burden on an organization with an average of $240,000 in annual California "sales" is patent. Moreover, the administrative burden would not be proportional to the volume of sales. Large and small ministries alike would face formidable

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[42] The burden of an audit is far from negligible. The audit in this case took some 2-3 weeks, during which auditors had full access to appellant's records and the cooperation of appellant's auditor.

start-up costs. If the principle of *Murdock* and *Follett* is overruled as applied to state sales and use taxes, small religious organizations with limited financial resources will be effectively excluded from participating in this form of ministry.

This Court predicted in *Walz* that "[e]limination of exemption [in the context of property tax] would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674. Similar forms of entanglement, and worse, would follow from abrogation of immunity from sales and use taxation. Notwithstanding appellant's cooperation with the authorities, the present controversy has featured on-site inspections of appellant's evangelistic crusades (J.S. App. F3), lengthy on-site audits (which, when multiplied by all the taxing jurisdictions, would become virtually continual), inspection of appellant's books and records, threats of criminal prosecution, and, finally, six layers of administrative and judicial process.[43] This constitutes precisely the sort of entanglement this Court has repeatedly condemned in the context of financial aid. *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). Surely, the constitutional strictures against excessive entanglement, which exist in part to protect religious adherents from government intrusion into internal religious matters (*Aguilar*, 473 U.S. at 410; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-04 (1979)) apply no less to efforts to tax the church than they apply to efforts to aid the church.

To be sure, not all administrative interactions between government and a religious body amount to "excessive" entanglement, in violation of the First

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[43] Imagine the effect on a smaller religious ministry whose rights are invaded by the tax authorities.

Amendment. In *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), for instance, the Court upheld recordkeeping requirements under the Fair Labor Standards Act, as applied to commercial businesses owned by a religious organization. The Court's reasoning, however, supports our position in this case. The Court noted, first, that the recordkeeping requirements applied "only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on [the Foundation's] own evangelical activities." *Id.* at 305. By contrast, the State in this case seeks to impose its administrative requirements directly on appellant's "evangelical activities" – the dissemination of religious doctrine. We have no quarrel with the State's authority to tax and regulate the secular, commercial activities of the church. It is the religious core that is protected under the First Amendment.

The Court in *Alamo Foundation* also stressed that the recordkeeping requirements in that case were "routine and factual." 471 U.S. at 305. This case, by contrast, involves recurring, subjective, and religion-sensitive determinations about donative intent, subject to government auditing and surveillance. There is no easy, objective way to distinguish among the donations, sales, and mixed transactions between appellant and its adherents; as the auditor testified, there is inevitably a "human ingredient" in determining the intended nature of the transaction (J.A. 171, Tr. 173).[44]

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[44] These distinctions also occur, and can cause entanglement problems, in connection with the individual donor's computation of tax deductions. See *Hernandez*, slip op. 12. But the constitutional problem is far more serious in the context of a tax imposed on the religious institution. The individual's tax return is already subjected to individuated determinations, some of which hinge on the taxpayer's mental state. These conflicts do not create entanglement between the institutions of

(Continued on following page)

More importantly, the State's administration of sales and use tax is fraught with discretion and uncertainty. Under the State's broad definition of a "sale," taxable transactions within churches, synagogues, and other religious communities are ubiquitous. Roman Catholic churches "sell" votive candles for ceremonial purposes; Jewish synagogues "sell" tickets for high holy days; Mormon churches "sell" religious undergarments; Sunday school teachers "sell" religious curriculum; religious pamphlets are available for "sale" in most church foyers or narthexes; many churches periodically "sell" Bibles, prayer books, or hymnbooks; churches often collect "suggested donations" for attendance at performances of sacred music; religious groups often "charge" for meals at fellowship gatherings. All of these "sales" are for the purpose of disseminating religious doctrine or practicing the faith. But it is not likely – it would be neither cost-effective nor politically prudent – for the states to interpose themselves in each of these transactions to insist upon collection of the tax. Far more likely is that the states will look the other way for the vast bulk of these religious "sales," and come down hard on those religious organizations that are large enough, unpopular enough, out-of-state enough, that the political costs of collection are less than the gains.

The problem is especially acute because sales and use tax procedures and liability are often so complicated that they must be resolved through negotiation and estimation. Indeed, appellee's district administrator in charge of this case admitted that the Board of Equalization has a "practice" – "totally at the discretion of the Board" – of "work[ing] with taxpayers" to avoid the "burdensome

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church and state. But the administration of the sales and use tax system, if upheld by this Court, would lead to an unprecedented level of interaction between religious bodies and the agents of the government.

record-keeping and accounting practices" that are required by the letter of the statutes and regulations. J.A. 176-77, Tr. 212-13. The record in this case shows that the amounts owing to appellee could not be determined with precision and that appellant's auditor had to reach an agreement with the state on estimated liability. J.A. 148-49, Tr. 153-154. Where negotiation between church and state is required, the possibility of arbitrariness and selectivity, as well as entangling conflict, is introduced. See *Aguilar* v. *Felton*, 473 U.S. at 413 (when "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to" a governmental program, this constitutes a threat of excessive entanglement). Contacts between church and state must be kept "straightforward and susceptible to . . . routinization," *Committee for Public Education* v. *Regan*, 444 U.S. 646, 660 (1980), not open-ended, subjective, and contestable.

The record in this case also shows that agents of the state first threatened criminal prosecution for appellant's refusal to register its evangelistic crusades with the state (J.S. App. E1-E2), then informally waived this demand and with it the threat (Tr. 11). Again, this illustrates the vulnerability of religious organizations to the ad hoc decisions of agents of the state. As this Court has observed, "[t]he threat of sanctions may deter the[] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Discretion and legal uncertainty are the handmaidens of arbitariness and selectivity. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) (an ordinance giving government officials unbridled discretion over First Amendment protected activity held unconstitutional even without specific evidence of abuse).

These considerations distinguish this case from *Texas Monthly*, as well as from *Alamo Foundation*. In *Texas Monthly*, the "state's interest in uniform application" of

its tax laws supported imposition of sales tax on religious magazines (109 S. Ct. 905). In this context, it is virtually impossible for the state to achieve "uniform application" of its sales and use taxes, as applied to all "sales" of religious materials by religious bodies to their adherents. One of the disturbing features of the state taxing power struck down in *Murdock* was the way in which it could be deployed against unpopular itinerants with no political base in the community. If the principle of *Murdock* is overruled, there will be no practicable way to ensure that the taxing power is exerted uniformly, and no practicable defense against its abuse. The interaction between church and state, far from being "routine and factual" (*Alamo Foundation*, 471 U.S. at 305), would be "comprehensive, discriminating, and continuing." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).

To be sure, either course – taxation or immunity – necessarily entails some degree of entanglement. But immunity from tax is the less entangling alternative. *Walz*, 397 U.S. at 674-75. The degree of entanglement can be analyzed in terms of the nature of both the *determinations* that must be made and the *procedural interactions* that are involved.

The decision whether a ministry's "sales" are immune from taxation entails two key determinations: Is the organization religious? Are the materials in question religious? Such determinations have been approved or even required by this Court in the context of many governmental programs. See *Bowen* v. *Kendrick*, 108 S. Ct. 2562 (1988) (under Adolescent Family Life Act, Secretary of HHS must determine whether potential grantees are "pervasively sectarian"); *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973) (under programs to aid higher education, state officials must determine whether potential beneficiaries are pervasively sectarian); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (state unemployment compensation commission must determine whether worker's reasons for discharge were "religious"). The distinction

between "religious" and other organizations is made every day by state and federal tax authorities, since their treatment for purposes of property, gift, inheritance, and income tax, as well as filing and audit requirements, hinges on the distinction. There is nothing about sales and use taxes that makes the distinction here any more problematic than it is elsewhere.

The other determination that must be made for purposes of immunity is whether the materials "sold" have the purpose of spreading religious doctrine. This determination, too, is frequently necessary and has been approved and even required by this Court. See *Kendrick*, 108 S. Ct. at 2581 (Secretary of HHS must determine whether materials used in the program "have an explicitly religious content or are designed to inculcate the views of a particular religious faith"); *Lemon*, 403 U.S. at 617 (review of textbooks for religious content is required, though review of a teacher's conduct would be excessively entangling); *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (state must examine textbooks to determine whether they have religious content).

By contrast, sales and use taxation on the distribution of religious literature would require numerous difficult and intrusive examinations of the organization's operations. To take a basic example, how is the state to determine what is the "price" of a religious tape or pamphlet when it is sometimes offered free, sometimes sent in thanks for an unspecified donation (or a donation far in excess of its cost), and offered for different "prices" at different times?[45] Must state agents monitor appellant's religious broadcasts to listen to the "terms of sale" at different times? Must they attend the religious services at which these things are announced? Must they read appellant's magazine, "The Evangelist"? Will they interrogate

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[45] This was not a problem in *Hernandez*, since the charge for "auditing" and "training" sessions was fixed and unalterable. See slip op. 10.

church officials responsible for setting price or determining when materials should be given away? Or will they attempt to set a "market value" on religious materials whose value to the "purchasers" is spiritual? Or will they attempt to determine appellant's "costs" of "production"? And if so, how will they "value" and allocate volunteer time, "overhead expenses" devoted to worship, prayer, or spiritual counseling, or the cost of "publicity," *i.e.*, evangelism?

The procedural interactions needed for recognition of immunity are also far less entangling than for imposition of tax. This Court has recognized that "one-time, single-purpose" interactions between church and state pose less serious entanglement problems than "continuing financial relationships or dependencies, . . . annual audits, and . . . government analysis of an institution's expenditures." *Tilton* v. *Richardson*, 403 U.S. 672, 688 (1971); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 763 (1976) (plurality); see *Kendrick*, 108 S. Ct. at 2596 (Blackmun, J., dissenting). The immunity determination can be made once, and unless circumstances change, need not be made again. When a determination of tax immunity has been made, there will be no further contacts between religious and governmental authorities – no forms to file, no questions to answer, no audits to endure, no criminal prosecutions to be threatened. But the administration of the tax, if it is upheld, would involve repeated (considering the number of jurisdictions, virtually continuous) monitoring, investigation, on-site audits, and negotiations.

This Court is presented with a clear choice between deep, intrusive, and continuing entanglement between church and state and "a reasonable and balanced attempt to guard against those dangers" (*Walz*, 397 U.S. at 673). In the years since *Murdock*, the states have wisely refrained from this form of intrusion. We fear that, with fiscal needs appearing ever more pressing, more states will follow appellee's lead and turn to evangelistic activity as a source of revenue. The abrogation of tax immunity

would profoundly alter the "relationship between the government and the religious authority" (*Lemon*, 403 U.S. at 615), from benevolent separation to active entanglement.

D. Immunity From Tax in this Case Would Be Fully Consistent With This Court's Establishment Clause Jurisprudence

The plurality's disquiet in *Texas Monthly* with the wider implications of *Murdock* and *Follett* evidently stems from the perception that an exemption from taxation targeted solely at religious organizations must be viewed as "state sponsorship of religious belief." *Id.* at 900. The plurality equated the tax exemption in *Texas Monthly* with a "subsidy exclusively to religious organizations." *Id.* at 899. So understood, *Murdock* and *Follett* seem to require precisely what the Establishment Clause seems to forbid: a subsidy to religion. We submit, however, that *Murdock* and *Follett* are fully in keeping with this Court's cases under both the Free Exercise and Establishment Clauses, and that the perceived conflict between *Murdock-Follett* and the Establishment Clause is more apparent than real.

Not all tax exemptions are the equivalent of a "subsidy," either in symbolic impact or in economic substance. As Justice Brennan observed in *Walz*, "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." 397 U.S. at 691 (citation omitted). It should not be forgotten that the same Virginia statesmen who put an end to subsidies for religion themselves enacted exemptions for churches in the Commonwealth.[46] As discussed above,[47] an immunity from tax on a religious activity

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[46] For an account, see Justice Brennan's concurring opinion in *Walz*, 397 U.S. at 683-85.

[47] See Section II-B, *supra*.

removes a government burden on free exercise, while other tax benefits, such as eligibility for tax deductible contributions, more closely resemble a subsidy.

The only serious claim that the State could make that immunity from sales and use tax liability is a "subsidy" as a matter of economic substance is under circumstances in which the exempt entity receives valuable public services but is not required to pay for them. That might well justify a tax that is reasonably calculated to defray the costs of benefits bestowed on the religious body. But it would be fanciful to suggest that California's sales and use tax is such a tax – especially as applied to an evangelistic ministry headquartered in Louisiana, which makes only brief and occasional forays into the State. See note 3, *supra*. The sales and use tax has no relation whatsoever to the level of benefits bestowed by the State on a religious body.

As this Court has recently observed, "there is no constitutional requirement that the benefits received from a taxing authority *by an ordinary commercial taxpayer* . . . must equal the amount of its tax obligation." *Cotton Petroleum Corp.* v. *New Mexico*, No. 87-1827, slip op. 44 (Apr. 25, 1989) (emphasis added). Ordinary commercial taxpayers ordinarily can protect themselves through the political process. But when taxes are imposed directly on the dissemination of religious doctrine, there must be a closer fit between taxes extracted and benefits conferred, lest the realm of religious action be reserved to those who "have a full purse." *Murdock*, 319 U.S. at 112. As Justice Murphy observed:

> Respondents [the tax authorities] do not show that the instant activities of Jehovah's Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses. In the absence of such a showing, I think no tax whatever can be levied on petitioners' activities in distributing their literature or disseminating their ideas. If the guaranties of freedom of speech and

> freedom of the press are to be preserved, municipalities should not be free to raise general revenue by taxes on the circulation of information and opinion in non-commercial causes; other sources can be found, the taxation of which will not choke off ideas.

Jones v. *Opelika*, 316 U.S. at 620, adopted by the Court, 319 U.S. at 104. This is not, therefore, a case about subsidies from California to appellant. It is a case about whether revenue can be exacted by California from appellant.

Second, it is now well established (as it was not at the time of *Murdock* and *Follett*) that the Free Exercise Clause frequently exempts *religious organizations alone* from governmental burdens,[48] just as the Establishment Clause sometimes bars religious organizations alone from governmental benefits.[49] Free exercise exemptions do not entail violation of the Establishment Clause merely because the "benefit" of exemption falls solely to the religious. To be an establishment, the assistance must be of a form that actively induces or encourages – not merely accommodates – religious behavior. *Corporation of Presiding Bishop* v. *Amos*, 107 U.S. at 2868.

Moreover, the legitimacy of free exercise exemptions presupposes that the protected category – "religion" – be defined broadly enough to encompass nontheistic (even atheistic) opinions about "religious" subjects, including "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." See *Texas*

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[48] *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862, 2869 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packages with benefits to secular entities"); see *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (exempting religious schools from Labor Board jurisdiction); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exempting church schools from unemployment tax).

[49] *E.g.*, *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and cases cited therein.

Monthly, 109 S. Ct. at 906 (Blackmun, J. concurring). Some state statutes that would otherwise be legitimate accommodations of religion are unconstitutional if they incorporate too narrow an understanding of "religion." This was the principal vice of the statute in *Texas Monthly*. The First Amendment does not permit ideological viewpoint discrimination in the guise of a free exercise claim. But when "religion" is appropriately defined, the Free Exercise Clause, by its very language, requires that the special needs of religious organizations and the special threats to religious autonomy be recognized. There is no constitutional requirement that the relations between church and state be no different than the relations between commerce and state. "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Murdock*, 319 U.S. at 111.

Tax exemptions targeted solely to religious organizations might well be unconstitutional if the effect were to subsidize the church by providing valuable public benefits at the expense of secular taxpayers, and if the tax presented no plausible dangers to the free exercise of religion. In this case, however, there is no danger of subsidy, and there are powerful reasons to believe that application of the California sales and use tax law would violate appellant's First Amendment rights. Under these circumstances, to grant an immunity from sales and use taxes imposed on the preaching of the gospel and the distribution of religious doctrine could not reasonably be deemed to be an establishment of religion.

CONCLUSION

The judgment of the Court of Appeal of the State of California should be reversed.

Respectfully submitted,

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APPENDIX

TABLE 1: STATE STATUTES AND REGULATIONS RELATING TO SALES AND USE TAX

STATE	CODE CITATION	ADMINISTRATIVE REGULATIONS
ALA.	Ala. Code §40-23-1 et seq.	AR T18-011, AR C1-021,
ALASKA	AS 29.45.650 et seq. * note 1	N/A
ARIZ.	ARS §42-1301.1 et seq. R15-5-1502 et seq.	R15-5-209.A et seq.,
ARK.	Ark. Stats §84-1902 et seq.	GR-3 et seq., UT-3 et seq.
CALIF.	Rev. & Tax., §6006 et seq., § 7200 et seq.	18 Cal. Admin Code §1620 et seq. 1501 et seq.
COLO.	CRS §39-26-104 et seq.	1 CCR 201-4,201-5
CONN.	CGS 12-407 et seq.	CAR 12-426-3 et seq.
DEL.	NO SALES & USE TAX	
D.C.	DCC 47-2001 et seq.	9 DCMR 404 et seq.
FLOR.	FS 212 et seq.	Admin Code §12A-1.001 et seq.
GA.	OCGA §48-8-2 et seq.	GR §560-12-1 et seq.
HAWAII	HRS §237-2 et seq.	Tax Regs §§18-237-1 et seq.
IDAHO	IC §63-3609 et seq.	Tax Regs 13,2 et seq.
ILL.	Ill. Rev Stats, ch. 120 et seq., ch. 24,8-11-1, ch 34	UT Reg §150.101
IND.	Ind. Code §6-2.5-1-2 et seq.	Admin Code §2.2-4-35 et seq.
IOWA	IC §422.42 et seq.	730 Admin Code §15.1 et seq.
KAN.	KSA §79-3600 et seq.	Admin Reg 92-19-1 et seq.
KY.	KRS §139.100 et seq.	103 Admin Reg 28:050 et seq.
LA.	Rev Stats La 47:301 et seq.	Sales Tax Regs 47:301 et seq.

STATE	CODE CITATION	ADMINISTRATIVE REGULATIONS
MAINE	36 MRSA §1752 et seq.	08-128 CMR 301.1 et seq.
MD.	Ann Code,Art 81, §324 et seq.	MD Regs .03.06.01 et seq.
MASS.	MGL, ch 62C, 64H & 64I	830 CMR c.62C
MICH.	MCLA 205.51, MSA 7.521	Admin Code R. 205.5 et seq.
MINN.	Minn Stats §297A.01 et seq.	Minn Rule 8130.1500 et seq.
MISS.	MCA 27-65-1 et seq.	Miss Sales & Use Tax Regs 4, 38,41,70
MO.	Mo Rev Stats 144.010.1	12 C.S.R. 10-3.01 et seq.
MONT.	NO SALES & USE TAX	
NEB.	Neb Rev Stats 77-2702 et seq.	Rev Reg 1-001 et seq.
NEV.	Nev Rev Stats, ch 372	Admin Code §372
N.H.	NO SALES & USE TAX	
N.J.	NJS 54:2B-2, 54:32B-3	N.J.A.C. 18:24-7 et seq.
N.M.	NMSA §7-9-3 et seq.	Gross Receipts & Comp. Regs. 3:1 et seq.
N.Y.	Consolid Laws of NY, ch 60 §1101 et seq.	20 NY Code, Rules & Regs 525
N.CAR.	NCGS 105-164 et seq.	17 NCAC 7B.01 et seq., 6 NCAC 7C.01 et seq.
N.DAK.	ND Century Code 57-39.2	NDAC 84-04.1-01 et seq.
OHIO	ORC 5739.01 et seq.	OAC 5703-9-14 et seq.
OK.	68 OS §1350 et seq.	Sales Tax Rules & Regs No. 13-3 et seq.

ORE.	NO SALES & USE TAX	
PENN.	72 Pa.Stats §7201 et seq.	61 Admin .Code §31.1 et seq.
R.ISL.	RI Gen. Laws §44-18-7 et seq.	Sales & Use Tax Regs, 3 et seq.
S.CAR.	SC Code 12-35-100 et seq.	Sales & Use Tax Regs 117-174
S.DAK.	SDCL 10-45-1.1 et seq.	ARSD 64:06:02:81
TENN.	T.C.A. §67-6-101 et seq.	Admin Code §1320-5-1-1.0 et seq.
TEX.	Tex.Tax Code §151.001 et seq.	Tex. Admin. Code tit.34, §3.285 et. seq.
UTAH	UCA §§59-2-1401 et seq., 59-12-101 et seq.	Sales & Use Tax Rules S1 et seq.
VT.	32 V.S.A. §9701 et seq.	Vt. Tax Reg. 1.9701 et seq.
VA.	Va. Code §58.1-602 et seq.	Va. Retail Sales & Use Tax Regs §630-10-01 et seq.
WASH.	Rev. Code 82.03.010 et seq	Admin Code 458-20-101 et seq.
W.VA.	W. Va. Code §11-15-2 et seq.	Admin Regs, Consumer Sales & Use Tax§13.04 et seq.,§33.01 etseq.
WISC.	Wisc. Stats §77.51 et seq.	Admin Code, §11.002 et seq.
WYO.	Wyo. Stats §39-6-402 et seq.	Wyo. Sales Tax Regs §9 et seq. Wyo. Use Tax Regs §3 et seq.

* Note 1: ALASKA does not impose a *State* sales and use tax, but permits *local governments* to do so. See Table 2.

TABLE 2: SALES AND USE TAX RATES BY STATES AND SELECTED LOCAL TAXING JURISDICTIONS

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
ALA.	390		4.0%			
					2.0%	
		Birmingham (Jefferson)		1.0%		
					3.0	
		Huntsville (Madison)		1.0		
					3.0	
		Mobile		1.5	2.0	
		Montgomery				
ALASKA	101		0.0			
* note 1					0.5	
		Akutan			1.0	
		Shismaref		1.5		
		Ketchican Gtway			2.0	
		Alakanuk			3.0	
		Anderson			4.0	
		Nome		4.0		
		Juneau			5.0	
		Wrangell			6.0	
		Barrow				

ARIZ. * note 2	82		5.0		
		Flagstaff		S:1.0 U:0.0	
		Phoenix		S:1.2 U:1.2	0.5
		Tucson		S:2.0 U:0.0	
		Coolidge [single item over $10K]		1.5	
		[sale under $10 K]		2.0	
		Gila Bend [single inv. over $1200]		1.0	
		[sale under $1200]		2.0	
		Holbrook [portion of single sale over $1000]		1.0	
		[all other sales]		2.0	
		Parker [single item over $2500]		1.0	
		[all other sales]		2.0	
ARK. * note 3	143		4.0		
	Fayetteville		1.0		
		(Washington)	1.0		
		Fort Smith		1.0	
		(Pulaski)	1.0		

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
CALIF.	447		4.75			
		(Orange)		1.25		
		Los Angeles			1.25	0.5
		(Sacramento)		1.25		
		(San Diego)		1.25		
		San Francisco			1.25	0.5
COLO.	236		3.0			
		Colo. Springs			2.5	
		(El Paso)		1.0		
		Denver			3.5	0.6
		(Jefferson)		0.5		
		Golden			2.0	0.6
		Pueblo			3.5	
CONN.	1		7.5			
					6.0	
D.C.	1					
FLA	11		5.0			

GA.	156		3.0			
		(Fulton)		1.0		1.0
		(Muscogee)		2.0		
		(Bibb)		1.0		
		(Chatham)		1.0		1.0
HAW.	1		4.0			
IDAHO	1		5.0			
ILL.	1,384		5.0			
		Chicago			2.0	
		(Cook)		1.0		1.0
		(Peoria)		1.25		
		(Winnebago)		1.25		
		Rockford			1.0	
		(Sangamon)		1.25		
		Springfield			1.0	
IND.	1		5.0			
IOWA	39		4.0			

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
KANS.	176		4.0			
		Kansas City			1.0	
		(Wyandotte)		1.0		
		Topeka			1.0	
		(Shawnee)		1.0		
		(Sedgwick)		1.0		
KENT.	1		5.0			
LA.	303		4.0			
		(E.Baton Rouge)	3.0			
		Lafayette			2.0	
		(Lafayette)		1.5		
		Lake Charles			2.0	
		(Calcasieu)		1.5		
		Monroe			2.5	
		(Ouachita)		0.5		
		(Orleans)		5.0		
		Shreveport			2.0	
MAINE	1		5.0			

MD.	1		5.0		
MASS.	1		5.0		
MICH.	1		4.0		
MINN.	4		6.0		
		Duluth		1.0	
		Minneapolis		0.5	
MISS.	1		6.0		
MO.	675		4.225		
		(Jackson)	0.5		
		Independence		1.0	
		Kansas City		1.0	0.5
		St. Louis		1.375	0.5
		Springfield		1.0	
		(Greene)	0.5		
NEB.	26		4.0		
		Lincoln		1.5	
		Omaha		1.5	

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
NEV.	8		5.75			
		(Clark)		.25		
		(Washoe)		.25		.25
N.J.	1		6.0			
N.MEX.	133		4.75			
		Albuquerque			.25	
		Santa Fe			.625	
N.YORK	84		4.0			
		(Albany)		3.0		
		(Erie)		4.0		
		New York City			4.0	.25
		(Monroe)		3.0		
		(Onondaga)		3.0		
		Yonkers			2.5	.25
		(Westchester)		1.5		
N.CAR.	101		3.0			
		(Forsyth)		2.0		

N.DAK.	5		5.0		
		Bismarck		1.0	
OHIO	89		5.0		
		(Summit)	0.5		
		(Cuyahoga)	1.0		1.0
		(Montgomery)	0.5		0.5
		(Lucas)	1.0		
OKLA.	480		4.0		
		(Cherokee)	1.0		
		Oklahoma City		2.0	
		Okmulgee		3.5	
		Tulsa		3.0	
PENN.	1		6.0		
R.ISL.	1		6.0		
S.CAR.	1		5.0		
S.DAK.	121		4.0		
		Sioux Falls		2.0	
		Pierre		1.0	

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
TENN.	107		5.5			
		(Hamilton)		1.75		
		(Knox)		1.5		
		(Davidson)		2.25		
TEXAS	1,108		6.0			
		Abilene			1.0	
		Austin			1.0	1.0
		Fort Worth			1.0	.25
		(Lubbock)		0.5		
UTAH	259		5.0938			
		Provo			.91	.25
VER.	1		4.0			
VA.	137		3.5			
		Norfolk			1.0	
		(Arlington)		1.0		

WASH.	318		6.5	
		Seattle		1.6
		Spokane		1.3
W.VA.	1		6.0	
WISC.	19		5.0	
		(Barron)		0.5
WYO.	17		3.0	
		(Laramie)		2.0
		(Natrona)		1.0
TOTAL	7,001			

Notes to accompany Table 2

Sources: Advisory Commission on Intergovernmental Relations, 1 *Significant Features of Fiscal Federalism* (1989), Table 27, pp. 58-59; *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988).

Column 1: In *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 759, n. 12 (1967) this Court noted that there were over 2,300 taxing jurisdictions in the country at that time with varying rates of sales and use tax. Column 1 indicates the number of local jurisdictions within each State that impose sales and use tax, as well as the total number of jurisdictions (7,001) that currently impose this form of taxation.

Column 2: This column lists a few cities within each state to reflect examples of variations in state and local tax rates, indicated in columns 3-6.

Note 1: Throughout the nation local sales and use tax rates are constantly in flux. For example, a tax specialist writes of the situation in Alaska: "Local rates are often subject to frequent change. No listing of rates should be relied upon. Taxpayers should telephone the specific taxing entity to verify rate." F. Dinces, "Alaska Sales & Use Taxes," in *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 2-2. For more precise schedules of the rates of sales and use tax by state and by other local taxing authorities, see the *National Sales Tax Rate Directory* updated on a monthly basis by VERTEX Systems, Inc.

Note 2: Various cities require separate filings in addition to those required at the state level. For example, the major cities in Arizona are not part of the state tax collection program, but administer and collect their own sales and use taxes, set at different rates. "If a business is going to conduct a taxable activity within one of these cities, it must make separate application to the city involved for a Sales Tax license. Additionally, separate city Sales Tax returns must be prepared and filed with these cities." P. Derdenger, "Arizona Sales & Use Taxes," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 3-14. The Table also offers examples of the variation of the rate of taxation *within the same local jurisdiction* in Arizona, depending on to the size of a purchase or single invoice, indicated within brackets. For purposes of complying with the varying local rates and regulations governing sales and use tax, the ZIP code of a buyer is insufficiently precise. Although these postal designations generally do not cross county lines, they are not a reliable indication of the taxing authority because they do not necessarily correspond to the geographical limits of school districts or other taxing entities.

Note 3: The states generally impose a statutory ceiling on the rate that local taxing authorities may charge in sales and use tax. Some reflect this limit not only with a cap on the percentage of the sale, but with a fixed amount of tax on a sale. For example, "the maximum local tax [in Arkansas] is $25 on a 'single transaction,' defined by local ordinance." J. Eads, "Arkansas Sales & Use Tax," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 4-3.

TABLE 3: STATE-BY-STATE VARIATIONS IN PROVISIONS FOR SALES AND USE TAX

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
ALABAMA	YES (0)	FEL	SELLER	YES	NO
ALASKA	NO ST TAX	N/A	SELLER	N/A	N/A
ARIZONA	YES ($5)	FEL	SELLER	YES	YES
ARK.	YES (0)	FEL	BUYER	YES * note 1	NO
CALIF.	YES (0)	M$I	SELLER	YES * note 1	YES
COLO.	YES ($2.50)	FEL	BUYER	YES	YES
CONN.	YES ($20)	M$I	BUYER	YES	NO
D.C.	YES (0)	M$I	SELLER	YES	YES
FLORIDA	YES ($5)	M	BUYER	YES	YES

GEORGIA	YES (0)	M$I	BUYER	YES * note 1	YES
HAWAII	YES ($3)	M	SELLER	YES	YES
IDAHO	YES (0)	FEL	BUYER	YES	YES
ILL.	YES (0)	FEL	SELLER	NO * note 2	NO
IND.	YES ($25)	M$I	BUYER	YES	YES
IOWA	YES (0)	FEL	BUYER	YES	YES
KANSAS	YES (0)	M$I	BUYER	YES	NO
KENT.	YES (0)	M$I	SELLER	YES	YES
LA.	YES (0)	M$I	BUYER	YES	YES
MAINE	YES (0)	M$I	BUYER	YES	NO * note 3
MD.	YES ($5)	M$I	BUYER	YES	YES
MASS.	YES ($10)	FEL	BUYER	NO	YES
MICH.	YES ($1)	M$I	SELLER	NO	NO * note 3

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
MINN.	YES ($1)	FEL	BUYER	YES	YES
MISS.	YES (0)	M$I	SELLER	YES	NO
MO.	YES (0)	M	SELLER	YES	YES
NEB.	YES ($1)	FEL	BUYER	YES	YES
NEVADA	YES ($2)	M$I	BUYER	YES	YES
N.J.	YES (0)	M$I	BUYER	YES	YES
N.M.	YES (0)	FEL	SELLER	NO	NO
N.Y.	YES (0)	FEL	BUYER	YES	YES
N.CAR.	YES ($5)	M$I	SELLER	YES	YES
N.DAK.	YES (0)	M	BUYER	YES	YES

OHIO	YES ($25)	FEL	BUYER	YES	NO
OKLA.	YES (0)	M$I	BUYER	YES	YES
PENN.	YES (0)	M$I	BUYER	YES	YES
R.ISL.	YES ($5)	FEL	BUYER	YES	NO
S.CAR.	YES ($5up)	M$I	SELLER	YES	YES
S.DAK.	YES (0)	FEL	SELLER	NO	NO
TENN.	YES (0)	FEL	SELLER	YES	YES
TEXAS	YES (0)	M$	BUYER	YES *notes 1,2	YES
UTAH	YES (0)	FEL	BUYER	YES	YES
VERMONT	YES (0)	FEL	BUYER	YES	YES
VA.	YES (0)	M	SELLER	YES	YES
WASH.		M	BUYER		
Sales-Use	YES ($15)			YES	NO
Bus-Occup	YES ($15)			NO	NO

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
W. VA.		FEL	BUYER		
Bus-Occup	NO			NO	NO
Consumers	NO			YES	NO
WISC.	YES ($2)	M	SELLER	YES * note 1	YES
WYO.	YES (0)	M$I	BUYER	NO	YES * note 3

Notes to Accompany Table 3

Source for columns 1, 4 & 5: *All States Tax Handbook* Par. 258 (Prentice-Hall 1984).

Source for column 2: Statutes (see Table 1).

Source for column 3: *All States Tax Handbook* Par. 250 (Prentice-Hall 1984).

Column 1: Almost all states require sellers to obtain a license or permit. Many states charge a flat fee for this license. That sum is indicated in parentheses.

Column 2: All states enforce various provisions of the sales and use tax laws, (e.g., collection of tax, accuracy of filing, compliance with audit) with both civil and criminal penalties. Criminal sanctions are indicated by the use of the following symbols: **FEL** = violation of one or more of the sales and use tax provisions can result in a *felony* conviction; **M** = violation of one or more of the sales and use tax provisions cannot result in a felony conviction, but may result in a *misdemeanor* conviction; if the statute specifies the amount of a potential *fine*, that is indicated by the $ symbol; if the statute also specifies the amount of potential *imprisonment*, that is indicated by the letter **I.**

Column 3: The designation of the primary tax (sales or gross receipts) as a tax on the *seller* or the *buyer* is important in determining deductibility of the tax for state income tax purposes.

Column 4: YES = state law prohibits sellers from absorbing tax. Some states allow sellers to include tax in selling price or to "reimburse" themselves after adding tax to sales price; that is reflected by an asterisk, followed by "note 1." Although some states do not require sellers to pass tax on to buyer, they do require sellers to collect use tax from buyer; that is reflected by an asterisk, followed by "note 2".

Column 5: YES = state law prohibits sellers from advertising or holding out that they will absorb tax. Some states add that sellers may not advertise that tax is not considered an element of the price; that is reflected by an asterisk, followed by "note 3".

* **Note 1:** Sellers may reimburse themselves by adding tax to sales price.

* **Note 2:** Sellers must collect use tax, if payable, from buyer.

* **Note 3:** Sellers may not advertise that tax is not considered an element of the price.

TABLE 4: STATE-BY-STATE VARIATIONS IN FILING DEADLINES FOR SALES AND USE TAX

Symbols used in this Table: **20th** = date of month; **M** = month or monthly; **B-M** = bi-monthly (every other month); **Q** = quarter or quarterly; **S-A** = semi-annual (twice a year); **A** = annual; **Sales** = Sales or Gross Receipts tax; **Use** = Use tax; **$** = amount of tax liability/period, unless otherwise noted.

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering due date)	QUARTERLY DEADLINE (amt of tax triggering due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering due date)
ALABAMA	*Sales:* M: 20th (if over $25/M)	*Sales:* 20th of Jan, Apr,Jul,Oct (if under $25/M) *Use:* 20th of M after Q (* See note 1 on permission of Dept of Rev)	n/a
ALASKA	Varies acc. to locality	Varies acc. to locality	n/a

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering due date)	QUARTERLY DEADLINE (amt of tax triggering due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering due date)
ARIZONA	M: 20th	(if est. annual liability $200-500)	A: (if est. annual liability under $200)
ARKANSAS	M: 20th (if over $5/M)	20th of Jan,Apr,Jul, Oct (if under $5/M) * note 1 permission	n/a
CALIF.	B-M: 24th and 23rd (if over $17,000)	last day of Jan, Apr,July,Oct ** See note 2 on prepayment)	n/a
COLORADO	M: 20th (if over $300/M) * note 1 permission	20th of Jan,Apr, July,Oct (if under $300/M)	n/a
CONN.	M: last day (if ann amt owed is over $4,000)	last day of Jan, Apr,July,Oct	A: seasonal sellers (if under $2,500)

D.C.	M: 20th	n/a	A: Jan 20 (if under $50/M)
FLORIDA	M: 20th	(if quarterly tax under $100) * note 2 prepayment	S-A: (if semi-annual tax under $200)
GEORGIA	M: 20th	20th of Jan,Apr,July, Oct (if 6-month average under $100) * note 1 permission * note 2 prepayment	n/a
HAWAII	M: last day	end of Jan, Apr, July,Oct (if ann. tax over $1,000)	A: Apr 20 (if ann. tax under $1,000)
IDAHO	M: 20th	n/a	n/a
ILLINOIS	M: last day	* note 2 prepayment: Q prepayments due on 7th, 15th, 22nd, & last day of current month (if average over $10,000/M for 4 preceding quarters)	A: Jan 31 (if monthly average under $20)

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
INDIANA	M: 30th; (but on 20th if average over $1,000/M for prior yr)	* note 1 ("less frequent" reporting with permission of Dept of Rev)	* note 1 ("less frequent" reporting with permission of Dept of Rev)
IOWA	B-M: 25th & 10th (if over $4,000 for B-M period), then on 15th of month in next Q. U: 20th (if over $1,500/month)	last day of Jan,Apr July,Oct * note 2 prepayment: (if over $500/M in in 1st or 2nd month of Q, tax due by 20th)	A: Jan 31 (if under $120/yr)
KANSAS	M: 25th	Q: 25th (if under $100/M or $1,200/yr) * note 1 permission	A: Jan. 31 (if under $5/M or $60/yr)
KENTUCKY	M: 20th	n/a	n/a

LOUISIANA	M: 20th	Q: 20th (if under $100/M) * note 1 permission	n/a
MAINE	M: 15th	Q: 15th of Jan,Apr, July,Oct (if under $400/yr) * note 1 permission	A: Jan 15 (if under $100/yr); S-A: July & Jan 15 (if between $100-$200/yr)
MARYLAND	M: 20th	n/a	n/a
MASS.	M: 20th (but in 5 business days after 22nd, if over $25,000/yr)	20th of Jan,Apr,July, Oct (if between $101-$1,200/yr)	A: Jan 20 (if under $100/yr)
MICHIGAN	M: 15th	n/a	n/a
MINN.	M: 25th	25th of Jan,Apr,July Oct (if av monthly tax under $250	A: Jan 25 (if average monthly tax under $25)
MISS.	M: 20th	20th of Jan,Apr,July, Oct (if under $100/M) * note 1 permission	n/a

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
MISSOURI	M: *Sales:* by 20th of next month (if tax over $250 for 1st or 2nd calendar Q mo) M: *Use:* by 15th of next month (if tax over $250 for 1st or 2nd calendar Q mo)	*Sales:* last day of Jan,Apr,July,Oct *Use:* 15th of Jan,Apr, July,Oct	A: Jan 31 (if quarterly tax under $45)
NEBRASKA	25th	last day of Jan,Apr, July,Oct (if under under $60/Q) * note 1 permission	"some other basis" * note 1 permission
NEVADA	last day	last day of Jan,Apr, July,Oct (if under $10,000 gross taxable sales/mo)	n/a

N.J.	20th (if over $100/M)	20th of Jan,Apr,July Oct (if under $100/M)	n/a
N.MEX.	25th (report, pay monthly by following 25th)	n/a	n/a
NEW YORK	20th (if taxable receipts over $300K in any of 4 preceding Qs)	20th of Mar,June,Sept Dec (if taxable receipts under $300K in all 4 preceding Qs)	n/a
N.CAR.	15th (if over $25/M)	15th (if under $25/M) * note 1 permission	n/a
N.DAK.	22nd (if tax for prior year $332,000.99)	last day of Jan,Apr, July,Oct (if tax for prior year under $332,000.99)	n/a
OHIO	*Sales:* M: 23rd (reported by seller)	*Use:* 15th of Jan, Apr,July,Oct (reported by buyer)	S-A *filing* by 25th of Jan & July, but M *payment* of tax by 23rd of month if under "advance payment authority"

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
OKLA.	*Sales:* M: 15th *Use:* M: 20th	n/a	S-A: 15th of Jan, July for "seasonals or transients" (if under $50/mo)
PENN.	*Sales:* M: 20th (if over $600/3rd calendar Q) *Use:* M: 20th	*Sales:* 20th of Jan, 15th of June, 20th of July & Oct (if under $600/3rd calendar Q)	n/a
R.ISLAND	M: 20th	*report* last day of month after Q, but *pay* in 5 days after 22nd of each M; Q *reporting* may be allowed if average under $200 for 6 consec. M	n/a

S.CAR.	*Sales:* M: 20th *Use:* M: 20th (if over $25,000/M for 3 consec. M of previous yr)	*Use:* 20th of Jan,Apr, July,Oct * note 1 permission	*Sales:* A: 25th (if under $1,200/yr)
S.DAK.	B-M: last day after 2M period M: last day (if over $600 in any 2M period)	n/a	n/a
TENN.	M: 20th	20th of Jan,Apr,July, Oct (if av under $180 for 12 consec. M)	n/a
TEXAS	M: 20th	20th after end of Q (if under $500/M or $1,500/calenda. Q)	n/a
UTAH	n/a	30th of Jan,Apr,July Oct	A: June 15 (if over $96,000/yr or $24,000 /Q or if est. tax over $8,000/M)

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
VERMONT	M: 30th (Feb 28th)	n/a	n/a
VA.	M: 20th	n/a	n/a
WASH.	M: 25th	n/a	n/a
W.VA.	*Sales:* M: 15th, but Dec due Jan 30	*Sales:* last day of Jan, Apr,July,Oct (if under $50/M) *Use:* 15th of Jan,Apr, July,Oct * note 1 permission	n/a
WISC	M: last day (if over $600/Q)	last day of Jan,Apr, July,Oct	n/a
WYOMING	last day	last day of Jan,Apr, July,Oct (if under $150/M * note 1 permission	n/a

Notes to accompany Table 4

Source: *All States Tax Handbook* Par. 250 (Prentice-Hall 1984).

Columns 1 & 2: In most states there is a presumptive requirement of filing on either a monthly or a quarterly basis. The filing date refers to both sales & use tax, unless otherwise specified for those states having different filing dates for sales tax and for use tax.

Column 3: The timing of the filing deadline is contingent in most states upon the amount of tax liability that a taxpayer owes. A lower amount of tax liability may trigger a different filing date. This Table reflects the complexity of even knowing when to file in most states by including in parentheses the dollar amounts triggering a different filing date.

* **Note 1:** Permission of Department of Revenue may be required for filing on some other date.

** **Note 2:** Several states require prepayment of estimated tax. Some states impose this obligation in a complicated form. For example, California requires: "Prepayments in the second calendar quarter must be 95% of state and local tax liability for first monthly period and 95% of such liability for second monthly period, plus 95% of liability for first 15 days of third monthly period, or 95% of liability for second monthly period, plus 50% of 95% of liability for second monthly period. Same per-

centage requirements apply to second calendar quarter payments that must be made by persons with estimated measure of tax liability averaging $200,000 or more per month ... if certain financial contingencies occur. If liability averages $17,000 or more, 95% prepayment is required in second quarter, 90% in other quarters. In second calendar quarter, first prepayment must be made by 24th day, and second prepayment by 23rd day.... Persons with liability of $17,000 or more must prepay by 24th day following end of first two monthly periods." *All States Tax Handbook*, p. 206 (Prentice-Hall 1984).

TABLE 5: EXEMPTIONS IN STATE CODES FOR SALES BY RELIGIOUS ORGANIZATIONS

STATE	1 EXEMPTION?	2 CONSTITUTIONAL EXEMPTION?	3 SPECIFIC EXEMPTION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECESSARILY RELATED TO RELIG PURPOSES
ALA.	SPECIFIC (special acts of legis)	YES	YES * note 2	YES
ALASKA	Varies acc. to locality * See note 1	N/A	N/A	N/A
ARIZ.	SPECIFIC	YES	NO	YES * note 5
ARK.	GENERAL	YES	YES * notes 2 & 3	YES
CALIF.	SPECIFIC	YES	YES/NO * note 2	YES * note 5
COLO.	SPECIFIC	YES	YES * note 3	YES * note 5
CONN.	SPECIFIC	YES	YES * note 3	YES

STATE	1 EXEMPTION?	2 CONSTITU-TIONAL EXEMPTION?	3 SPECIFIC EXEMP-TION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECES-SARILY RELATED TO RELIG PURPOSES
D.C.	SPECIFIC	YES	YES * note 2	YES
FLA.	GENERAL	YES	YES * note 2	NO
GA.	SPECIFIC	YES	YES * note 2	YES * notes 4 & 5
HAW.	SPECIFIC	YES	YES	NO * note 5
IDAHO	SPECIFIC	YES	YES * note 2	YES * notes 4 & 5
ILL.	SPECIFIC	NO	YES * note 3	YES * note 5
IND.	SPECIFIC	NO	NO	YES * note 5
IOWA	GENERAL	YES	YES * note 3	YES * note 5
KAN.	SPECIFIC	NO	YES * note 3	YES * note 5
KENT.	SPECIFIC	YES	NO	YES * notes 4 & 5

LA.	SPECIFIC	NO	YES * note 3	YES * note 5
MAINE	SPECIFIC	YES	YES * notes 2 & 3	YES
MD.	SPECIFIC	NO	YES * note 3	YES * note 5
MASS.	SPECIFIC	YES	YES * notes 2 & 3	YES * note 5
MICH.	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
MINN.	SPECIFIC	YES	NO	YES * note 5
MISS.	SPECIFIC	YES	YES	YES
MO.	GENERAL	YES	YES	NO
NEB.	GENERAL	YES	YES * note 3	YES * notes 4 & 5
NEV.	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
N.JER.	GENERAL	YES	YES * note 2	YES * notes 4 & 5
N.MEX.	GENERAL	YES *	YES	NO
N.YORK	GENERAL	YES *	YES *	YES

STATE	1 EXEMPTION?	2 CONSTITU-TIONAL EXEMPTION?	3 SPECIFIC EXEMP-TION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECES-SARILY RELATED TO RELIG PURPOSES
N.CAR.	SPECIFIC	YES	YES * note 2	YES
N.DAK.	SPECIFIC	YES	YES * note 2	NO
OHIO	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
OKLA.	GENERAL	YES *	YES *	YES * notes 4 & 5
PENN.	SPECIFIC	YES	YES * note 2	NO
R.ISL.	GENERAL	YES	YES * note 2	YES * notes 4 & 5
S.CAR.	SPECIFIC	YES	YES	YES
S.DAK.	SPECIFIC	YES	YES	NO
TENN.	SPECIFIC	YES	YES * note 2	NO

TEXAS	GENERAL	YES	YES	NO
UTAH	GENERAL	YES	YES	YES
VT.	GENERAL	YES	YES * note 3	YES
VA.	GENERAL	YES *	YES * note 2	YES
WASH.	SPECIFIC	YES	YES * notes 2 & 3	NO
W.VA.	SPECIFIC	NO	NO	YES * note 5
WISC.	SPECIFIC	YES	NO	NO
WYO.	SPECIFIC	YES	NO	YES

Notes to accompany Table 5

Sources for columns 1-4: Statutes (see table 1), and *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988). For other examples of varying state exemptions (e.g., food, prescription drugs, consumer electric and gas utilities, and clothing), see Table 25 in Advisory Commission on Intergovernmental Relations, 1 *Significant Features of Fiscal Federalism* 54-55 (1989). This Table does not report any of the variations in exemptions provided under the regulations of local taxing jurisdictions.

Column 1: All states provide some form of exemption for "sales" by religious organizations. Sometimes a state exemption statute includes religious organizations within a broader group of other charitable organizations. Where a state statute provides an exemption for *all "sales"* by religious organizations, that is indicated by the word, **"GENERAL."** Where a state statute provides an exemption for *particular "sales"* by religious organizations in specified categories (consult columns 3 & 4), that is indicated by the word, **"SPECIFIC."**

Column 2: YES = state law provides an express statutory exemption from any sales that the state is prohibited from taxing under the federal or state *constitution*. Since by implication the general includes the specific, this column also includes New Mexico, New York, Oklahoma, and Virginia, which grant a general exemption to religious organizations from **all** sales and use tax liability, but do not have an express statutory provision along the lines of the other states given a **YES** in this column.

Column 3: YES = state law provides an express statutory exemption for "sales" by religious organizations that are *clearly functionally related to the religious purposes* of the organization. See notes 2 & 3. Since by implication the general includes the specific, this column also includes Iowa, New York, Oklahoma, and Vermont, which grant a general exemption to religious organizations from **all** sales and use tax liability, but do not have an express statutory provision along the lines of the other states given a **YES** in this column.

Column 4: YES = state law provides an express statutory exemption on "sales" by religious organizations that may under some circumstances be *related to the religious purposes* of the organization, but that are *not necessarily* so. See notes 4 & 5.

Note 1: An expert on sales and use tax in Alaska writes: "Because of the diversity among the jurisdictions' ordinances, no exemption/deduction can safely be considered to be uniformly applied. Each locality exempts different transactions/items." F. Dinces, "Alaska Sales & Use Taxes," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 2-3.

Note 2: The states indicated by this asterisk provide an express statutory exemption for distribution of sacred scripture, hymnbooks, pamphlets, and other forms of religious literature. The District of Columbia and Massachusetts exempt publications by religious organizations; this Table assumes that those publications are religious in nature, and reports them in column 3. This Table does not reflect all the state court decisions that have held that the constitution requires immunity for religious organizations from sales tax in circumstances similar to this case. California has both a

YES and a NO in this column because another Court of Appeal has ruled that sales tax may not be applied to a religious organization, *Institute in Basic Youth Conflicts v. State Board of Equalization*, 166 Cal. App. 3d 1093 (1985), but the court below has ruled to the contrary.

Note 3: The states indicated by this asterisk provide an express statutory exemption for sales of magazines and newspapers, or sale and consumption of paper & ink, without any specific reference to religious speech. Although tax exemptions are often narrowly construed, religious speech is presumptively included within these exemptions along with nonreligious speech.

Note 4: The states indicated by this asterisk provide an exemption for sales of meals served in nonprofit schools, or from occasional sale of property (e.g., greeting cards, candy) for a small sum (e.g., $5).

Note 5: The states indicated by this asterisk provide an exemption for gross receipts from occasional events such as parish festivals or bazaars, including communal meals, for purpose of fundraising.

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No. 88-1374

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLEE'S BRIEF

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLEE'S BRIEF

ISSUES

The ultimate issue in this case is whether plaintiff and appellant The Jimmy Swaggart Ministries (formerly known as "Jimmy Swaggart Evangelistic Association", and referred to herein and in the California courts as "ministries" or "JSM") is entitled to refund of taxes paid under the California Sales and Use Tax Law for the period April 1, 1974 through December 31, 1981,[1] (California Rev. & Tax. Code,

[1] Sometimes called the "period in issue" or "audit period." (All references are to this period unless otherwise indicated.)

[hereinafter "R & T Code"] § 6001, et seq.) on sales made at evangelistic meetings or "crusades" in California[2] and on sales by mail order direct from its Louisiana headquarters to California purchasers.

The only federal issue presented in the complaint and the only issue properly before this Court is whether such tax was "a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment . . . " (CT 4; Complaint, par. 12.)[3]

---

[2] The defendant, California State Board of Equalization (hereinafter sometimes "SBE" or "board"), asserts that the mail order sales are subject to the *use* tax (see Cal. Code Regs. tit. 18, § 1620, ¶¶ (a)(2)(g) and (b)(1)); and the crusade sales are taxable under the *sales* tax *or* under the use tax if the sales tax is inapplicable. (R & T Code, §§ 6051, 6201.)

[3] The parties stipulated:

> "Exhibits '1' and '2' to the Complaint constituted the argument and evidence presented administratively on its Petition for Redetermination and Claim for Refund. The Complaint herein (paragraph 12) bases JSM's claim to Refund upon the grounds stated in exhibit '1' to the Complaint alleging, 'In summary, it is alleged that California cannot impose a sales or use tax upon distribution of Bibles, religious books, religious tapes and other religious materials in the State of California because to do so would constitute an interference with the free exercise of religion as set forth in Article I, Section 4 of the California Constitution, and because it is a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment to the Constitution of the United States.' " (Joint Appendix [hereafter JA] 59.)

At trial and on appeal JSM attempted to add a number of other issues not contained in its claim for refund or in its complaint.[4] It has abandoned most of these. However, in Brief for the Appellant (16-20) JSM continues to assert lack of "Nexus" (a due process commerce clause requirement before a state can assert jurisdiction over a taxpayer) even though the California courts held that issue was not properly before them and declined to rule thereon, and SBE had no opportunity to discover or present evidence on this issue to the court.

---

[4] A commerce clause argument (abandoned) before appeal that a sales tax cannot be placed on an interstate transaction because it is cumulative and discriminatory was included in plaintiff's trial brief (CT 48-49). A "nexus" argument based on commerce clause and due process was made in a supplemental memorandum filed on the first day of trial. (Supp. CT 1-6.) SBE's motion in limine to exclude evidence not relevant to the First Amendment issue pleaded in the complaint was granted. (Evidence pertaining to nexus was to be considered as an offer of proof.) (RT 14.) Appellant's motion after the close of SBE's case to reconsider exclusion of the nexus issue and allow amendment of the complaint was denied, the court observing that failure to raise the issue until at or just before trial deprived SBE of the opportunity to do discovery with respect thereto. (RT 229-231.)

JSM on appeal asserted for the first time arguments purportedly under the Ninth and Tenth Amendments to the United States Constitution which it included in question 1 of the Jurisdictional Statement here but apparently has abandoned by failure to argue these grounds in the Brief for the Appellant filed herein.

Appellant has also pleaded violation of the *California Constitution* (art. I, § 4) counterpart of the First Amendment, but has not mentioned it on appeal, and it does not raise any federal question.

Although JSM's claim for refund was based solely upon alleged "interference with [JSM's] 'free exercise' of religion" (JA 12; also 34, 11-16), and no facts were presented to the administrative body suggesting any constitutional entanglement, (see fn. 3, *supra*), JSM offered evidence and argued "entanglement" at trial, over objections of SBE that the issues before the court were limited to those set forth in the claim for refund (JA 64-65).

Both the trial and appellate courts ruled under the facts presented in accordance with California rules as to burden of proof regarding evidence and appellate review, that JSM had not carried its burden of proving excessive entanglement which violated the Establishment Clause. (See JA 245-252.) Here, contrary to these rules, JSM continues to assert the evidence most favorable to it which in the face of conflicting evidence was rejected by the California courts as a basis for its claims of violation of the Establishment Clause; JSM here also improperly relies on claimed "facts" not presented as evidence to the California courts. Any review by this Court of JSM's Establishment Clause contentions should be based upon the same evidence and rules before the California courts, i.e. if there is substantial evidence in the record (ignoring all conflicting evidence to the contrary) which supports the California courts' determination that JSM failed to establish any violation of the Establishment Clause in the application of the tax in issue, this ruling should be affirmed.

STATEMENT OF THE CASE

A. Procedural Facts

From 1975[5] through 1981, JSM sold tangible personal property at "crusades" in California.[6] About 1980, SBE discovered that JSM had been retailing tangible personal property at its crusades in California without registering as a seller or reporting and paying tax on its sales to California customers.[7] (*Jurisdictional Statement* [hereinafter JS], APP. E-1.) An audit was thereafter commenced by

---

[5] The audit here in issue goes back to 1974; however, crusade meeting dates in California during 1974 were not available (JA 19).

[6] In response to SBE's interrogatory asking for the percentage breakdown of sales of (a) bibles, (b) sermon booklets, (c) study manuals, (d) gospel piano/organ courses, (e) other books, (f) audio recorded music, (g) audio recorded sermons, or (h) "other tangible personal property (identify and describe)", JSM furnished a schedule of nationwide "MERCH SALES" for 1979 to mid-1982 of "Albums" $3,019,456, "Tapes", $4,202,980, "Books", $? 896,519 and "Other", $8,052,564, suggesting that from these figures one could estimate California percentages and "This is the best and only available method of determining distributions by items in California." (JA 201-02.) By examination of JSM's solicitation materials in its "Evangelist" magazine (Trial Exhibits 8-15) and that which was directly mailed to California (JA 121-28), it appears that JSM sold mugs, bowls, plates, pen and pencil sets, bud vases, communion cups, candlesticks, a Roman coin (replica), prints of religious scenes, T-shirts with JSM logo, replicas of the Crown of Thorns and Ark of the Covenant (CT 20), as well as instrumental music, organ and piano lessons, vocal music; taped talks and books (on religious-morals-family related subjects), as well as bibles, sermons and a biography of Jimmy Swaggart.

[7] It was in a second letter to JSM's attorneys requesting registration (after the first request had been ignored) that a

(Continued on following page)

SBE during which the auditor asked about the mail order sales which he discovered; the question was reviewed by SBE's legal department and in July 1981, counsel for JSM was advised that the available facts indicated that there was sufficient nexus to tax the mail order sales (JA, APP. F-1 to F-4.) No assertion was made by JSM that there was no nexus to tax the mail order sales until half a decade later, at or just before trial in 1986. Until 1986, JSM's consistent and sole position through its attorney was that *any* taxation of JSM (or registration by JSM as a seller) was an unconstitutional prohibition of the free exercise of religion by JSM under the First Amendment as interpreted by *"Murdock"* and *"Follett"* (see Petn. for Redetermination [JA 11], Claim for Refund, [JA 34], and Complaint, [JA 37]).

The parties have stipulated, among other things, that:

> "JSM cooperated with SBE and the parties agreed, based upon JSM records available, that JSM sold for use in California tangible personal property for the period April 1, 1974, through

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business tax representative added by hand at the end a request for an immediate response which pointed out that "any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor." JSM appears to continue to assert that this statement constituted a "prior restraint" on its practice of religion, even though in May 1986, it conceded that it made sales in California which were taxable. (JA 62, ¶ 5.) No criminal action was ever taken by the Board for failure to register; nor has JSM initiated proper proceedings under California law (Writ of Prohibition) to contest the legality of any registration requirement. Registration is totally irrelevant to this tax refund proceeding, and (especially since JSM's concession that it made taxable sales) (no fee) registration requirements are clearly constitutional. (JA 242-43.)

December 31, 1981, measured by payment to JSM of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." (JA 58, ¶ 4.)

"Exhibits '1' and '2' to the complaint constituted the argument and evidence presented administratively on its Petition for Redetermination and Claim for Refund. The complaint herein (paragraph 12) bases JSM's claim to Refund upon the grounds stated in exhibit '1' to the complaint, alleging, 'In summary, it is alleged that California cannot impose a sales or use tax upon distribution of Bibles, religious books, religious tapes and other religious materials in the State of California because to do so would constitute an interference with the free exercise of religion as set forth in Article 1, Section 4 of the California Constitution, and because it is a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment to the Constitution of the United States." (JA 59, ¶ 12.)

After the above-mentioned Petition for Redetermination and Claim for Refund were denied, this action was filed to recover the approximately $15,000 per year of tax plus interest paid for the period April 1, 1974, through December 31, 1981.

B. Substantive Facts

The parties have stipulated to the following:

"For the period April 1, 1974, through December 31, 1981, (hereinafter 'the period') JSM was involved in transactions with California residents which were 'sales' by JSM and 'purchases' by those residents of 'tangible personal property' as those terms are defined by the California Sales and Use Tax Statutes. These

> 'sales' and 'purchases' of 'tangible personal property' in California took two forms: (1) direct 'sales' at evangelistic crusades conducted in California by JSM, which accounted for $240,560 received by JSM during the period; and (2) mail order 'sales' to people at addresses in California which accounted for $1,701,942 received by JSM during the period." (JA 61-62, ¶ 3.)
>
> ". . . .
>
> "The tangible personal property referred to in paragraph 3 above was classified on JSM's accounting records as 'albums', 'tapes', 'books', or 'other.' The specific items are described in copies of the 'Evangelist' and 'Instant Order' brochures described in paragraph 6. Pursuant to the April 1986 Procedural Stipulation to be filed herein, JSM no longer asserts non-taxability with respect to the items described in paragraph 13 thereof."[8] (JA 62, ¶ 5.)

JSM's Evangelist magazines and Instant Order brochures describe the merchandise it sold. (Exhibits 8 to 15, 43 [JA 121-28].) Those exhibits also contain mail order envelopes showing *fixed* prices for each item of merchandise offered for sale. They show that JSM was *selling for fixed prices* the merchandise advertised there. These solicitation materials do not offer to give away or "distribute" any item in issue free or without full payment of the specified price.[9]

---

[8] JSM thus has conceded that California properly taxed items "which JSM says do not have specific religious-message content, i.e., T-shirts with JSM logo, mugs, bowls, plates, replicas of crown of thorns, ark of the covenant, Roman coin, candlesticks, Bible stand, pen and pencil sets, prints of religious scenes, bud vases, and communion cups, . . . " (JA 59-60, ¶ 13.)

[9] JSM admitted also that normally only Jimmie or Donnie Swaggart had authority to reduce prices or give away merchandise

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JSM did not simply disseminate religious messages to "religious adherents." It sold to *anyone* who paid the price[10] T-shirts, pens and pencils, various dishes and replicas, instrumental music, and piano lessons; as well as books, tapes, and records containing religious and other information which, like the *Minneapolis Star* (460 U.S. 575) newspapers, have some First Amendment protection. While most of appellant's messages pertain or refer in some way to the life of Christ as contained in the New Testament or other parts of the Holy Bible, they include subjects covering many aspects of living, including alcoholism, homosexuality, the lives and activities of celebrities such as Jerry Lee Lewis, Jimmy Swaggart himself, Elvis Presley (exh. 13, August 1979, p. 14), personal finances, photo album-calendar (exh. 14, January 1980, p. 23; September 1980, p. 41), punishment and government (exh. 15, June 1981, p. 11).[11] JSM also

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(JA 204); gifts of merchandise at crusades were insignificant (JA 203); and "[a]ny give aways [of mail order merchandise] would occur when a visiting minister might be touring the facility and Jimmy Swaggart might offer him a bible as a gift. Other than the giving of items to visiting ministers, prices were not reduced below cost." (JA 204.)

[10] JSM points to no evidence in the record suggesting that it sold only to "adherents" following its particular religious tenets or did not sell to anyone who tendered the asking price.

[11] Here, Jimmy Swaggart says:

> " . . . human government was instituted by God Himself. Christians are commanded in the New Testament to pay taxes and to support government (Rom. 13:1-7; 1 Pet. 2:13-17). Law, as a part of

(Continued on following page)

gives advice on marriage and divorce. (*Id.* at 21-22, 24, including the humor in marriage.) JSM's publications also advertise for employees (*id.* at 28, 35, seeking proofreader, typist, attorney, and press operator) and publicized the broadcast over local television stations which show appellant's programs – including five local California cable channels. (*Id.* at 15.) Much of the merchandise offered by JSM for sale was music (both instrumental and vocal). (JA 128.) For example, in 1974 every Evangelist magazine offered music and nothing else for sale, except in August JSM also advertised (at an 80% discount) an "overstocked" bible. (Exh. 8.)

"The materials distributed at the crusades are identical to materials distributed through the mails." (Brief for the Appellant [hereinafter B of A 7].) None of the merchandise sold was "distributed directly for use in other activities of JSM." (JA 203, 204.)

The above shows that JSM here seeks First Amendment immunity of its sales of instrumental music, piano and organ lessons, as well as vocal music and a variety of written messages, *not* only "books, pamphlets, tapes, and

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> government, will continue as the rule of right in all eternal societies. If the right to govern is based upon the best public interest, then the right and duty to use any necessary means to attain this end must be recognized by all. It is somewhat absurd to believe that rulers have a right to govern, yet have no right to use the necessary means to enforce that government."

Apparently Jimmy Swaggart believes "Christians" should pay taxes (the "life blood" of government), but JSM need not contribute its share.

records with specific doctrinal and worship related content" (as it claims, B of A 21.)

C. All Facts Should be Construed to Support the Decisions Below and all Conflicting "Facts" Asserted by JSM (Except Relevant Undisputed Facts in Evidence) Should be Rejected.

Under California law applicable here, all factual disagreements must be resolved in favor of appellee SBE; a judgment is presumed correct; where the record is silent "all intendments and presumptions are indulged to support it." (*Kearl v. Board of Medical Quality Assurance* (1987) 189 Cal.App.3d 1040, 1051.)

> "It is well established that . . . the determination of [a] factual issue by the trial court upon conflicting evidence is conclusive upon an appellate court. (*People v. Puritan Ice Co., supra,* 24 Cal.2d at p. 651.)" (*Burroughs Corp. v. State Bd. of Equalization* (1984) 153 Cal.App.3d 1152, 1166.)
>
> "When a court's finding is attacked on the ground that it is not supported by the evidence, the power of an appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding or verdict. Questions of credibility must be resolved in favor of the factfinder's determination, and when two or more inferences can reasonably be drawn from the evidence, a reviewing court may not substitute its deductions for those of the trier of fact. If on any material point the evidence is in conflict, it must be assumed that the court resolved the conflict in favor of the prevailing party. (See also *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925 [101 Cal.Rptr. 568, 496 P.2d 480]; *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784 [59 Cal.Rptr. 141, 427 P.2d 805].) . . . "

(*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62.)

Many of the assertions claimed in Brief for the Appellant (35-45) to show unconstitutional entanglement with religion are contradicted and impeached (primarily by documentary evidence), are outside the record or are not relevant. JSM fails to mention the evidence which supports the California courts' holdings that JSM failed to show unconstitutional interference with free exercise of religion or entanglement violating the establishment clause.

The California Court of Appeals, after reviewing the evidence, specifically found that,

> "Neither Ministries' difficulty in establishing past 'sales' from its books due to its past accounting practices nor the requirement of future record-keeping involve the government with an excessive entanglement with religion so as to violate the establishment clause." (JA 252; footnote omitted.)

The California Court of Appeal noted that the evidence established that "Ministries had a sophisticated accounting staff and had recently computerized its accounting and that Ministries in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' from 'donations.' "[12] (JA 251-252.)

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[12] In its books, Ministries had at least six categories for donations ('crusade,' 'radio,' 't.v.,' 'mission,' 'radio stations' and 'other') and at least four categories for sales ('retail,' 'wholesale,' 'meeting & crusade,' and 'master charge'). Ministries' books also had a category for 'sales Fgt. shipping.'

In its 1980 application for recognition of an exemption from federal taxes under section 501(c)(3) of the Internal Revenue Code, Ministries stated it had ' . . . four primary sources of

(Continued on following page)

The brief for appellant herein regularly goes outside the record to support its position.[13]

(Continued from previous page)

financial support; [¶](1) Donations are received by collections made during the religious service conducted three (3) times per week at the Church . . . and during special evangelistic services conducted worldwide in municipal auditoriums; and through contributions solicited from those attending services in Baton Rouge, Louisiana and the general public either by direct personal appeal, by radio and television programs, by appeals made in the monthly publication 'The Evangelist', or other direct mail solicitation. [¶](2) Monies received from the sale of copyrighted religious material such as books, pamphlets, records and tapes. [¶](3) Fees received from the sale of radio broadcast time to religious programmers sharing similar beliefs with the [Ministries]. [¶](4) Gift annuities, bequests, donations in trust, and other gifts received through estate planning guidance and other fund-raising efforts established by [Ministrie's] Stewardship Department."

In its 1981 filings for a federal income tax exemption, Ministries distinguished between 'gifts, grants, and contributions received' and 'gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is not a business unrelated to the organization's charitable, etc. purpose' for the years 1977 through 1980, distinguished between the 'gifts, grants, and similar amounts received' and 'gross sales minus returns and allowances' for 1981, and attached comments separately addressing 'the sales of religious books, records, and tapes' and 'donations.' (JA 251-52, fn. 17.)

[13] Factual statements by appellant which are not supported by specific citations to the evidence before the trial court should be ignored. For example, no evidence was presented concerning appellant's present assertions that it made full and complete payment for each and every state service provided to it (B of A 5) and suggesting that California does not tax sales by other religious organizations (B of A 40), both of which are wrong.

Further, the Appendix attached to Brief for the Appellant which purports to describe state statutes relating to sales and use taxes should be ignored, not only because it is irrelevant (JSM concedes that California is the only state which taxed it during the period in issue – [B of A 13-14]), but it is also inaccurate and misleading at least as it applies to California. (For example, contrary to implications on page A-16, California requires no fee for registration; the primary tax in issue here is the use tax which is on the buyer, and federal cases have held that the legal incidence of the sales tax is also on the buyer for federal purposes even though California law does not require that the sales tax be passed onto the buyer: the sections discussing separate advertising and separate statement of taxes were repealed in 1979. The table 5, p. A-35, is misleading: The State Board of Equalization has asserted that both the sales and use tax apply; published California appellate court decisions uniformly uphold the validity of the use tax; the dictum in the *Institute* case re sales tax ((1985) 166 Cal.App.3d 1093, at 1105-06) was superseded by the reasoning in this case. (JA 236-44.)

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution states (in part), "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . " The state of California has not prohibited the free exercise of any religion by the imposition and collection of its sales and use taxes here in issue nor did the collection of this tax result in "establishment of religion."

The Brief for the Appellant (i) states the primary issue presented to be "whether the state may impose sales and use tax on the non-commercial distribution of religious materials by a religious ministry to its adherents for the purpose of advancing its religious doctrine." The clear answer under the First Amendment is that a state may do so as long as it does not establish a religion or prohibit the free exercise thereof. Here nothing the state has done has neither established nor prohibited the free exercise of any religion.

JSM's primary reliance throughout this case has been on the cases of *Murdock v. Pennsylvania* (1943) 319 U.S. 105 and *Follett v. McCormick* (1944) 321 U.S. 573. Those two cases involved criminal prosecutions for failure of ministers selling religious tracts as an integral part of their door-to-door ministry to pay before engaging in their religious activities flat license fees so large as to substantially prevent the itinerant ministers from buying food and shelter necessary to continue their ministry. Under these facts five members of this Court found an unconstitutional prior restraint to their freedom of speech and in effect a prohibition on the free exercise of their religion.

The *Murdock* and *Follett* decisions and subsequent cases have recognized that sales and use taxes as well as taxes on income, property, and room rental receipts are constitutional though imposed on the exercise of freedom of press, speech and religious activities, so long as they are general, secular and not discriminatory.

The California Sales and Use Tax in issue here is not a special tax on religion, but a general non-discriminatory tax on secular acts which has no prohibited constitutional effects. The sales and use taxes place *no* prior restraint on,

nor do they conflict or interfere with JSM's *practice* of religion. Unless JSM chooses not to collect tax reimbursement from its customers, its only burden is to calculate, report and pay the tax it collects as a small percentage of its sales receipts. The total burden imposed upon religion is no greater than that imposed by property and income taxes, including the federal income tax. Such burdens do not prohibit the free exercise of religion or entangle government in the religious activities to the extent that there is "establishment" in violation of the First Amendment.

The second question presented in the Brief for the Appellant (i), whether a state "may treat occasional religious worship services" there as "Nexus" is a commerce clause – due process issue neither decided by the courts below nor properly before this court. Its answer, however, is that any presence in the state *may be considered along with any other activities* in or connected with that state in determining whether there is sufficient "Nexus" to give a state constitutional jurisdiction to levy a tax or otherwise impose its laws upon a person. (Here even JSM's own admissions show much California activity beyond "occasional religious worship services".)

ARGUMENT

I

CALIFORNIA SALES AND USE TAX DOES NOT PROHIBIT THE FREE EXERCISE OF RELIGION

JSM has not asserted that the California Sales and Use Tax Law imposes a specific tax on religious activities, that it is administered or applied in a way directing it

against religious activities, that it is in any way discriminatory or denies equal protection of the laws to JSM or its "adherents", or is anything other than a non-discriminatory secular tax applied in an even-handed manner to all. JSM argues simply that as interpreted by *Murdock/Follett*, the free exercise and establishment clauses[14] of the First Amendment prohibit sales and use taxes on what it calls "Distribution of Religious Materials by Religious Bodies for the Purpose of Spreading Their Ideas." (B of A 21, heading II.)

The SBE believes that the opinion of the California Court of Appeal in this case contains a thorough and accurate analysis of the law (JA 228-44) (except for subsequent decisions of this court), which this court is requested to review.

A. The California Sales and Use Tax Law is a General "Gross Receipts" Tax Measured by the Sales Price of All Sales of Tangible Personal Property Made in or for Storage Use or Other Consumption in California.

The California Sales and Use Tax Law is in substance a double filter imposing either a "sales tax" (R & T Code, § 6051) or a "use tax" (*Id.*, § 6201) based upon the price of tangible personal property [purchased from "retailers"

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[14] It should be noted at the outset that while the *Murdock* (319 U.S. at 109-11, 115) and *Follett* (321 U.S. at 575, 577) cases included freedom of speech and press as an integral part of their discussion and basis for their decisions, JSM here has not complained that there is any interference with its freedom of speech or press by imposition of the California sales and use taxes on sales of its religious literature and messages here.

(*Id.*, §§ 6007, 6014, 6015)] for storage, use or other consumption in California (*Id.*, §§ 6008, 6009). "Retailer" includes anyone making more than two sales per year. (*Id.*, § 6019.) Thus, California (unlike many states which tax only sales of inventory of commercial businesses) imposes its sales and use taxes even though the seller or the purchaser may be charitable, religious, nonprofit, or state or local governmental in nature. (See *Union League Club v. Johnson* (1941) 18 Cal.2d 275, 278; *People v. Imperial County* (1946) 76 Cal.App.2d 572, 576-577; *Bank of America v. State Board of Equalization* (1962) 209 Cal.App.2d 780, 796-97.) It is applied uniformly in California to such sales and use of books, audio or video tapes and records or other tangible personal property even though such property conveys information protected by the First Amendment.[15] California's use tax is on the purchaser (R & T Code, § 6201); the sales tax is on the seller, but to the seller *may* be reimbursed (Cal. Civil Code, § 1656.1). Accordingly, anyone seeking to purchase the *Holy Bible* or copies of political or other speeches of any kind for use in California will normally pay either a use tax or sales tax reimbursement.

The storage and use which are taxable include the exercise of any right incident to the ownership of the property, and any keeping in California for any purpose except sale in the regular course of business or subsequent use solely outside of California. (R & T Code, §§ 6008, 6009.) Thus items (including books, records and tapes) purchased by Californians outside California normally become taxable immediately upon the purchaser

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[15] Newspapers and periodicals published at least four times a year are exempted. (R & T Code, § 6362.)

exercising any right of ownership (usually unwrapping or storage) as soon as the items are received in California, even though they may never be read or played and whether the purchaser's intended functional use is playing or reading it for entertainment or education, to find quotations or information to use in exercising one's own freedom of speech for political purposes, for worship of a particular religion, for musical background to other activities, or simply to impress visitors by displaying it as part of a collection.

JSM admits that the California sales and use taxes here are taxes for a secular purpose which neither advance nor inhibit religion. (JA 246.) They are the types of generally applicable, nondiscriminatory taxes which this Court said *could* be collected on sales of written expressions of free speech without violating the First Amendment (in *Minneapolis Star v. Minnesota Comm'r of Rev.*, (1983), 460 U.S. 575, 586), even as a license tax. (See also *Texas Monthly, Inc. v. Bullock* (1989) ___ U.S. ___, 109 S.Ct. 890 [plurality opinion]; *Times Mirror Co. v. City of Los Angeles* (1982) 192 Cal.App.3d 170, 182.)

Basically, under the California Sales and Use Tax Law, JSM and persons who purchase various religious materials from JSM are treated no differently from anyone else (including other nonprofit or governmental bodies as well as profit-making organizations) wishing to sell or purchase such materials for use in their exercise of freedom of religion or speech. SBE submits that persons who wish to use such uniformly taxed materials in exercise of their freedom of speech or religion are not exempted by the First Amendment from California's general uniform nondiscriminatory sales and use taxes.

II

RECENT CASES SHOW THAT JSM IS NOT EXCUSED BY THE *MURDOCK* AND *FOLLETT* CASES FROM PAYING CALIFORNIA SALES OR USE TAX.

JSM primarily asserts that *Murdock v. Pennsylvania* (1943) 319 U.S. 105 and *Follett v. McCormick* (1944) 321 U.S. 573[16] excuse it from paying the California Sales and Use Tax.

A. The *Murdock* and *Follett* Cases Are Distinguishable.

Murdock v. Pennsylvania. supra, 319 U.S. 105 involved Jehovah's Witnesses who went door-to-door distributing literature, playing a phonograph record, expounding certain of their religious views and soliciting people to "purchase" certain religious books and pamphlets. (*Id.* at 106-107.) They were criminally prosecuted and convicted for failure to obtain a license for a fixed fee required before any persons could solicit orders for goods or merchandise of any kind. (*Id.* at 106.) The court observed that hand distribution of religious tracts is an integral part of an age old form of missionary evangelism used on

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[16] JSM cites (B of A 8, 30) an obsolete Attorney General Opinion (No. 79-524) which was not followed by SBE in administering the Sales or Use Tax Law (JA 26), is inconsistent with subsequent judicial determinations discussed in this brief and was limited to its facts. (JA 244, fn. 14; *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization,* [hereinafter *"Institute"*] (1985) 166 Cal.App.3d at pp. 1106-1107, fn. 4.) Its reasoning is clearly wrong under current authorities; it should be rejected for all purposes here. It does *not* represent the position of the Attorney General.

a large scale by various religious sects whose colporteurs (ministers) carry the gospel to thousands upon thousands of homes and seek through personal visitation to win adherence to their faith. This was the manner largely used by the Jehovah's Witnesses whose colporteurs are specially trained and their qualifications equal those of preachers. (*Id.* at 109-110.) The Supreme Court held *only* that the preaching of the gospel through integrated personal visitations and distribution of religious literature is a religious practice with the same constitutional protection as more orthodox religious practices. It limited the single issue before it to the constitutionality of an ordinance which required such religious colporteurs to pay a flat license tax as a condition precedent to and *prior restraint* upon the practice of their religion (*Id.* at 110), which prohibited the free exercise of their religion and violated their freedom of speech. The *Murdock* court noted that the tax in issue was a "flat license tax, the payment of which is the condition of the exercise of these constitutional privileges." (*Id.* at 112.)

Going on, the court stated:

> " '[The tax involved] is a license tax – a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.' A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 56-58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.*, p. 47 and cases cited. A license tax applied to activities guaranteed by

the First Amendment would have the same destructive effect. . . . " (*Id.* at 113.)[17]

The *Murdock* decision also observed that the license tax in issue was fixed in amount and unrelated to the scope of activities or their realized revenues. (*Ibid.*) The "inherent vice and evil of this flat license tax," which was "collected as a condition of the pursuit of activities whose enjoyment is guaranteed by the First Amendment" was that it "restrains in advance those constitutional liberties of press and religion. . . ." (*Id.* at 114.)

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[17] The *McGoldrick* rule relied on in *Murdock* was overturned in 1977 by *Complete Auto Transit, Inc. v. Brady* (1977) 43 U.S. 274 (see JA 238-39). Brief for the Appellant does not mention the argument (contained in *Murdock*) that a state may not tax a privilege which it may not withhold. Thus, JSM appears to concede that *Complete Auto* eliminates its earlier erroneous argument that California's sales tax is unconstitutional because it is denoted as a "privilege" tax. (See JA 238-39.)

Complete Auto held that where a tax measured by income is proper (there against interstate commerce activities), such a tax is not invalidated because it is denoted as a "privilege" tax; i.e., the formal designation of an otherwise proper tax as a "privilege" tax does not render it unconstitutional. Specifically, *Complete Auto* held that constitutionality of a state tax must be judged on its effect (430 U.S. at 285, 288); it is not invalid because it is called a tax on a privilege granted by the United States Constitution. While *Complete Auto* does not directly refer to *Murdock*, it does (*Id.*, at 288-289) "reject the rule of" *and overrule Spector Motor Service v. O'Connor* ((1951) 340 U.S. 602); *Spector* was the leading case applying the *McGoldrick* rule that states may not tax the "privilege" of exercising the constitutionally protected right to engage in interstate commerce. Thus, this basic rule and reasoning upon which *Murdock* relied was taken away by *Complete Auto* in 1977 when it overruled *Spector*.

The court finally said that the ordinance "sets aside the residential areas as a prohibited zone, entry of which is denied plaintiff unless the tax is paid" and concluded that such restraint (or one which is city-wide in scope) is "an abridgment of the freedom of the press and a restraint on the free exercise of religion. They stand or fall together." Thereupon, the court reversed the criminal convictions for soliciting without a license. (*Id.* at 117.)

To avoid criminal prosecution, *before* the colporteurs in *Murdock* could lawfully begin to sell their materials (as an integral part of their preaching), for 5 cents to 25 cents each [319 U.S. at 107], each had to purchase a license for $1.50 per day to $20.00 for three weeks [319 U.S. at 106], whether or not he ever sold enough to pay the license fee – a truly oppressive limit on freedom of speech and religion. (The California tax here is entirely different. It is payable only after sales have been made and at a small [generally 6] percent of the money already received by JSM; here there is no restraint whatsoever on any religious activities, but merely [like the concededly constitutional income taxes which could have been collected from the *Murdock* preachers] a small diminution in the proceeds available to the seller.)[18]

The *Follett v. McCormick, supra,* 321 U.S. 573, facts were substantially the same as those in *Murdock* except

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[18] The use tax here is an obligation of the purchaser, which can be collected by JSM from its purchasers. (R & T Code, §§ 6202, 6203.) Thus, the use tax here places no direct financial burden on the seller (JSM) unless he elects not to collect the use tax from the purchaser (*Id.*, § 6203; *Bank of America v. State Board of Equalization* (1962) 209 Cal.App.2d 780, 792-93). JSM can also by agreement obtain reimbursement of any sales tax from its purchasers. (Cal. Civil Code, § 1656.1.)

that the flat license tax was applied to a Jehovah's Witness who was *not* itinerant but was a resident of the town (*Follett, supra,* at p. 575) where he was preaching the gospel by going house-to-house presenting the gospel of the kingdom both orally and in printed form. (*Id.* at p. 576.) The court again stated the exaction of a *prohibitive* license tax as a condition to the exercise of the great liberties guaranteed by the First Amendment was as obnoxious as the imposition of a censorship or a previous restraint (citing *Murdock*), and held that constitutional prohibition was equally applicable to the preacher who goes door-to-door in his own village as to one who preaches the gospel from the pulpit or the itinerant preacher in *Murdock*. (*Follett, supra,* at p. 577.) The court went on to say, however, that the exemption "of a preacher who preaches" from the fixed license tax before the court did not free him from taxes on income or property. (*Id.* at pp. 577-578.) (The taxes here in issue, like the permitted income tax on preachers is based on a percentage of their actual receipts; they are not a *fixed prior charge* payable before one may lawfully preach, like the unconstitutional "*Murdock*" and "*Follett*" taxes.)

Four of the judges on the Supreme Court dissented in 1943 and 1944 in *Murdock* and *Follett*, believing that it was constitutionally permissible to impose a license tax on the act of selling religious literature. (See opinions of Reed, Roberts, Frankfurter and Jackson.) Subsequent Supreme Court decisions support the dissent in this respect.

B. Subsequent Cases Severely Restrict *Murdock* and *Follett* and Uphold General Taxes (Like Those Here) Applied To Activities Related To Practice of Free Speech and Religion.

In more recent cases, this Court on different facts has adopted the *reasoning* of the dissents in *Murdock* and

Follett, has refused to expand application of the general statements of the *Murdock* five-judge majority in those cases, and has refused to expand the limited tax immunity created by them.

1. By 1947, the California Supreme Court held that the same type of literature which was involved in the *Murdock* case (that of Jehovah's Witnesses) was not excused by the First Amendment from the general California Personal Property Tax. (*Watchtower B. & T. Soc. v. County of L. A.* (1947) 30 Cal.2d 426.) This holding was affirmed in federal courts, and this Court refused to overrule this decision. (*Watchtower Bible & Tract Soc. v. Los Angeles County* (C.D.Cal. 1949) 84 F.Supp. 352, affd. (9th Cir. 1950) 181 F.2d 739, cert. den. 340 U.S. 820.) Thus, it is clear that the imposition of added burdens of a property tax imposed directly upon the very literature used in exercising one's religion and freedom of speech does not offend the First Amendment.

2. In *Braunfeld v. Brown* (1961) 366 U.S. 599, 606, the Supreme Court stated that to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the Legislature. The Supreme Court observed that the regulation in question in that case operated to make the practice of one's religious beliefs more expensive but it did not face them with a choice of forsaking their religious practices. (*Id.* at 605.) The list of legislation of this nature is nearly limitless.

3. In 1981, in *United States v. Lee* (1982) 455 U.S. 252, the court held that an Amish farmer must pay social security system taxes even though this was forbidden by

his bona fide religious beliefs and was a direct interference with the free exercise of his religion. (*Id.* at 257.) The court held that because of the "broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (*Id.* at 260.) Here, there is no direct interference with practice of religion (merely small financial cost of administering and paying those amounts JSM chooses not to collect from the purchasers). However, *Lee* illustrates that even direct interference by a tax with religion *may be permitted* because of government tax needs.

4. In 1983, this court held that imposing a *special* tax which *singled out* certain members of *the press,* violated the First Amendment where the state did not establish counter-balancing public interest justifying *differential* taxation. (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. 575.) There, Minnesota had but did not impose a complimentary Sales and Use Tax Law similar to that in California. The court observed that states *can* subject newspapers to *generally applicable* economic regulations without creating constitutional problems, but Minnesota had not chosen to apply its *general* complementary *Sales and Use Tax* to newspapers. The court suggested that the framers of the First Amendment were concerned with governmental use of "differential taxation" (as opposed to the power to tax generally) as a powerful governmental weapon against the taxpayer who was differentially taxed (*id.* at 585) and suggested that the state could tax businesses generally (citing *United States v. Lee*) without creating First Amendment problems. (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. at 586).

The court further observed that:

"The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.[9] . . .

"[Footnote] 9. Star Tribune insists that the premise of the State's argument – that a generally applicable sales tax would be constitutional – is incorrect, citing *Follett v. McCormick*, 321 U.S. 573 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Jones v. Opelika*, 319 U.S. 103 (1943). We think that *Breard v. Alexandria*, 341 U.S. 622 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett, supra*, at 576-578; *Murdock, supra*, at 112, 113-114; *Jones v. Opelika*, 316 U.S. 584, 609, 611 (1942) (Stone, C. J., dissenting), reasoning approved on rehearing in 319 U.S. 103 (1943); see *Grosjean v. American Press Co.*, 297 U.S., at 249; see generally *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (dictum); *Grosjean v. American Press Co., supra*, at 250 (dictum); cf. *Follett, supra*, at 578 (preacher subject to taxes on income or property) (dictum); *Murdock, supra*, at 112 (same) (dictum)." (*Id.* at 586-587.)

The foregoing footnote makes it clear that the 1983 Supreme Court believed that the *Murdock/Follett* cases are inapplicable to a generally applicable sales tax, i.e., a tax based upon the sales price collected when property is sold. The Minnesota general Sales and Use Tax under discussion there, is in substance the same as the California Sales and Use Tax in issue here.

5. On March 24, 1986, this Court dismissed an appeal for want of a substantial federal question in the case *Covenant Community Church v. Lowe* ((1986) ___ U.S. ___ [89 L.Ed.2d 710, 106 S.Ct. 1451]; hereinafter *"Covenant"*) and thus approved[19] the 1985 decision of the Supreme Court of Tennessee in that case (698 S.W.2d 339) which upheld against First Amendment objections a five percent *privilege* tax paid by a church (through the property owner) for the occupancy of motel rooms each Sunday *exclusively for religious worship and instruction.*

The Tennessee Supreme Court's observation that "the religious use to which the rooms are put is irrelevant to the imposition of the tax," (698 S.W.2d at p. 342) is equally applicable to the generally applicable sales and use taxes here based on the secular acts of selling, storage or use for any purpose in California. The California sales tax is on selling tangible personal property at retail and the California use tax is on any storage or use in California. Neither is a tax directed at or imposed on any religious function.

California's sales and use taxes, which are collected from receipts after the religious materials are sold at retail for use here (and which can be reimbursed from the

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[19] Such a dismissal affirms on the merits. (*Hicks v. Miranda* (1975) 422 U.S. 332, 344.)

purchaser), are less a burden and direct tax on a "core" or integral religious function than the general tax on occupancy of space in a motel was in *Covenant* where that *tax had to be paid by a church for occupancy every Sunday exclusively for religious worship and instruction*. SBE submits that the *Covenant* ruling is consistent with language quoted hereinabove from *Minnesota Star* indicating that a generally applicable nondiscriminatory tax imposed on secular acts, e.g., sales, use, storage, or occupancy, is not unconstitutional simply because the taxed activity may be part of a speech or religious activity.

6. This court's decision in *Texas Monthly* ((1989) 109 S.Ct. 890) earlier this year shows the need for a decision here clarifying the scope and effect of the *Murdock* and *Follett* cases. In that decision the plurality followed the *Minneapolis Star* lead, rejecting "unnecessarily sweeping statements" in *Murdock* and *Follett* and limiting their holdings to situations where the facts before the court clearly showed that the law as applied clearly *prohibited* free exercise of religion. (103 L.Ed.2d at 17-20.) On the other hand, Justices Blackmun and O'Connor felt that "defining the ultimate scope of *Murdock* and *Follett* may be left for another day" (*Id.*, at 22); Justice Scalia said those cases were "narrowly distinguishable" though not as "readily distinguishable as Justice Brennan suggests." (*Id.*, at 30); and Justice White discussed only the "Press Clause" (*Id.*, at 20).

7. On June 12, 1989, this court in *California Equalization Bd. v. Sierra Summit* 490 U.S. ___, 104 L.Ed.2d 910, threw out an old distinction between cases upholding "a tax on a government agent's property and [prohibiting] a tax imposed on its operations" (104 L.Ed.2d at 916) and held that the "nondiscriminating" California sales and

use tax here in issue must be paid on liquidation sales by bankruptcy trustees (even though it placed a financial burden on the court's liquidation process – the same burden from which JSM here requests constitutional immunity). The court's comment that "whatever immunity the bankrupt estate once enjoyed from taxation on its operations has long since eroded and . . . there is now no constitutional impediment to the imposition of a sales tax or use tax . . . " (*Id.*, at 917) should be equally applicable to sales by persons exercising their First Amendment freedoms of speech, press, or from prohibition of free exercise of religion.

There is no reason or justification for a general rule prohibiting the sales and use taxes here because they impose a financial and administrative burden on persons or organizations engaged in religious activities. Here the tax is only 6% of JSM's receipts and can be passed on to its purchasers; and the courts below have held that the evidence presented does not establish unconstitutional entanglement.

Apparently JSM as well as this Court recognizes that income and property taxes are not prohibited by the First Amendment. There is no significant constitutional distinction between either of these constitutionally permitted taxes and the California sales and use taxes, that would justify constitutional prohibition of the latter.[20]

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[20] Both the incidence and burdens are quite similar between income and sales taxes and between use and property taxes. Both California's income and sales taxes are based upon the income or receipts of the seller; the distinctions are that certain expenses of the selling are deducted in determining the amount subject to income tax, and while gross receipts taxes

(Continued on following page)

C. "Core Activities" Are Not Exempt From Fair Secular Non-Discriminatory Taxes.

Brief for the Appellant (24 to 31) argues that government may not tax "the dissemination of religious doctrine." JSM calls "the religious interactions between a religious organization and its adherents" "core activities" (B of A 26) which it asks this court to declare immune from taxation. (*Id.* at 31.) This court should reject this contention. There is nothing in the Constitution justifying it. Also, a great entanglement and close examination of "religious" and philosophical activities will be required to determine what is "core" as JSM has defined it; income, property and other taxes have been approved on what are probably core activities; and SBE has not taxed any "core" activities here.

JSM concedes that "the legitimacy of free exercise exemptions presupposes that the protected category be defined broadly enough to encompass nontheistic (even atheistic) opinions about 'religious' subjects, including 'such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong'" (*Id.* at 47),

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are on a higher measure [gross receipts without deductions]; the income tax during this period went up to rates (11%) substantially above the 6% sales tax rate.

The California use tax is imposed upon the first storage of or other exercise of any right of ownership over property in California. The property tax in the *Watchtower* case (discussed in sub-heading 1, *supra*) was also upon ownership of religious literature stored by a religious organization in California for the purpose of distributing it in furtherance of religious activities. (While California's property tax is at a lower rate, it is imposed each year upon the fair market value of the property, while use tax is imposed only once upon the purchase price.)

and exemptions must be extended to "philosophical literature distributed by nonreligious organizations devoted to these matters." (*Id.* at 23.) Thus, it would appear that "core" speech activities of non-commercial organizations and individuals designed to promote the moral, philosophical, environmental, educational, literary, and scientific well being of the world would be entitled to the same constitutional protection as JSM. How could one possibly determine what is "core" of such non-commercial activities?[21] It is one thing for the state to draft such an exemption encompassing a broader array of activity that would survive a challenge under the Establishment Clause, but it is something else to impose it upon the State on the basis of the Free Exercise Clause. (*Texas Monthly, supra,* 109 S.Ct. 890; Blackmun and O'Conner concurring, p. 906.) Justice Rehnquist, dissenting in *Thomas v. Review Board* (1981) 450 U.S. 707, 723 observed that the State may grant exemptions to religious persons but it is not constitutionally compelled to do so. Similarly, Justice White, dissenting in *Sherbert v. Verner* (1963) 374 U.S. 398, 422-23 observed that the State could carve out an exemption if it wanted to but that it would not be compelled to do so under the First Amendment.

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[21] Appellant claims tax immunity here under free exercise of religion, not freedom of speech or press. Thus, core activities would refer not just to communications, but to any non-communicative activities which are "core" to matters of good and evil and other protected philosophical matters. Would not telephone calls to arrange, and transporting participants to, a rally concerning a matter of conscience (e.g. right to life/choice) or JSM's crusades be part of the "core" activities? If so, such telephone calls and the fuel and vehicles used exclusively for core activities would, (under JSM's argument) be immune from communications, fuel, property and licensing taxes.

The plurality in *Texas Monthly v. Bullock, supra,* 109 S. Ct. 890, 905 concluded that the type of taxes in issue

> " . . . would not subject religious organizations to undue burdens and the government's interest in their uniform application is far weightier."

The court in *Hernandez v. Commissioner of Internal Revenue* (1989) 109 S.Ct. 2136, 2149, stated that with respect to disallowance of a deduction that

> " . . . our decision in *Lee* establishes that even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system'. . . ."

State Board of Equalization submits that a 6% reimbursable tax certainly is not a substantial burden, and even if it were, the state's interest in uniform application (not raising revenue as contended by JSM) of the tax justifies the burden.

This court in *Bowen v. Roy* (1986) 476 U.S. 693, stated that "the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." (*Id.*, at 699.) The court further observed that "the Free Exercise Clause affords an individual protection from certain forms of government compulsion . . . " (*Id.*, at p. 700.) More recently, this court in *Lyng v. Northwest Indian Protective Ass'n.* (1988) 485 U.S. ___ ; 108 S.Ct. 1319, 1326) stated "the crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government' [Citation]."

The sales and use tax does not impair a religion's or its adherents, freedom to believe, express or exercise a

religion. Just as the disallowance of the deduction in *Hernandez* would leave the church or the adherent with less money, similarly, the sales and use tax would have the same effect. This economic cost does not prohibit an adherent's ability to exercise freely his religious beliefs.

Even were there a "core" exemption, the activities here in issue would not qualify. The proposed protected "core" activities are the central practices of religion (e.g., prayer, sacraments, participating in religious ceremonies). Ministries refers to the "preaching." Preaching is the speaking and listening, the transmission of the actual religious thought from the minister to the ministered. This is not taxed by the California sales and use tax law. These taxes fall on either the sale or the initial storage – some time before there is any religious use of the materials purchased.[22] Further, the "core" of JSM's religion

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[22] JSM has not proven that all or any portion of the religious literature involved here was in fact ever used in any core religious activity by anyone, or that any of the purchasers were in fact "adherents." JSM has admitted that the merchandise sold at the crusades was not distributed for use in the crusade meetings or any other activities of appellant; nor was the mail order merchandise. (Exh. 55, JA 203, 204.) If a sale of literature or recordings which might or probably would, be used in religious ceremonies is constitutionally exempt from tax, why should JSM not be immune from a tax on transportation of those items to the purchaser or on the manufacture thereof, on the raw materials used therein or a property tax or income tax thereon? If the sales and use taxes here are prohibited, why should not use by JSM of its religious radio stations, of telephones exclusively to communicate religious messages and airplanes and trucks to take people and equipment to crusades (including fuel used for such travel) be exempt under the free exercise clause from all federal, state and local taxes? Why should not all taxes affecting any philosophical communication then be subject to "free exercise" attack?

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appears to be its "Tenets of the Faith" (JA 110-20). Little of the merchandise sold by JSM (see 8-9, *supra*) deals directly with this "core."

III

JSM FAILED TO ESTABLISH EXCESSIVE ENTANGLEMENT OR ANY UNCONSTITUTIONAL BURDEN

Although JSM presented no facts at the administrative level (and thus should be precluded from doing so in court) it presented extensive testimony of a Texas CPA at trial which it contends establishes that the administrative burden of sales taxes will be intolerable and therefore the California sales tax here should be held unconstitutional under the establishment clause. The California courts rejected this testimony and accepted conflicting primarily documentary evidence to the contrary. (JA 245-252.)

There was and should be no substantial burden in reporting California sales and use taxes. Taxes for the years in issue are agreed to (based on a percent of amounts clearly recorded by JSM in its own records as

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It also should be noted that the taxes assessed against amicus ISKCON occurred before any possible religious use because the sales tax was only on sales of books between Krishna corporate entities in California for future distribution at airports and the use tax was only on the cost of books purchased out-of-state and later distributed at airports. The SBE determined that the distribution of books at airports was not a sale since no fixed prices were set and therefore the respective Krishna corporate entities were consumers of the books given away and owed sales tax if purchased in California or use tax if purchased out-of-state.

"sales").[23] By 1981, JSM was an expertly staffed business-type computerized operation which claimed that it segregated sales from donations for income tax reasons.[24] SBE

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[23] Appellant's in-house CPAs (and computers since 1978) maintained separate accounts for various types of sales including specific retail sales, crusade sales and other accounts. (JA 154.) The CPA who prepared appellant's reports up to 1978 clearly segregated four types of sales and two types of donations. (JA 155.) Other documents in evidence showed that JSM segregated sales from donations for many purposes. (JA 251, fn. 17.) Only Appellant's CPA expert witness who prepared JSM's annual report after 1979 had problems in segregating sales from donations. He testified (JA 154) that he had some reservations and could not certify the segregation in his annual audit reports beginning in 1979 of "contributions" from "sales" because *some sales may have been included in the contribution accounts.* (JA 171-172.) He did not know if any of JSM's in-house accountants had tried to remove from JSM's "donations" accounts the amounts which he felt were really sales. (JA 163.)

[24] By June of 1981, JSM "brought in a team of computer experts" to assure that its computers would "process all items so that we know at all times exactly what you have asked for, how it is being processed, and when it is being shipped"; "To give you a year-end receipt for all your giving for the past year for income tax purposes"; and to assure that "the amount on the receipt be correct, even specifying (if need be) what the donation is for"; appellant estimated it would "take several months to work it out." (Exh. 15, June 1981, p. 23.)

Under federal income tax law, amounts paid for JSM's merchandise are not deductible; and further the fair value of items received from JSM upon making any "donations" must be subtracted to determine the amount of donation that may be deducted for income tax purposes. JSM's reports of donations for income tax purposes, *necessarily* separated out the FMV of items "sold," so this information was already in JSM's computers after 1981. (See *Hernandez v. Commissioner of Internal Revenue* [1989] ___ U.S. ___, 109 S.Ct. 2136.)

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simply collects a uniform six percent tax on mail order sales for use in California. There was and is no substantial burden in reporting the California mail order sales in the manner done for the period in issue, or in requesting JSM to add up and separately report the total sales made at each California crusade location.

This court's recent *Hernandez* decision (*Hernandez v. Commissioner of Internal Revenue, (supra)*, ___ U.S. ___, 109 S.Ct. 2136, decided June 5, 1989) makes it clear that for income tax purposes donations to religious organizations must be separated from purchases from religious organizations. JSM claimed in 1981 to be establishing computerized methods of providing to each "adherent" the amounts of its contributions to aid the adherent in taking its income tax deductions. (See fn. 24, *supra*.) This is the

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JSM did not need to hire more personnel; it already had expert accounting and tax personnel. This included witness Guinn, a highly paid Texas CPA, as well as in-house accountants and Mr. Treeby's highly paid law firm. Appellant's "Stewardship Department" claimed extensive expertise in taxes and related financial matters. JSM claimed it had "Stewardship Department Representatives" in at least six states including California who help subscribers to:

> "avoid all capital gains set up a plan that will pay you a higher income later in life when you need it more . provide income for another individual . remove or worries of investment counseling.
>
> "[and provide information] on income tax savings, the elimination [or] reduction of estate taxes, and the assurance that your money is spreading the Gospel around the world, while being administered by the professional services of the Jimmy Swaggart Ministries' Stewardship Department. . . ." (Exh. 15, June 1981, p. 16.)

same information which JSM here argues it does not have and cannot get without huge expenses.

Any organization which wants to segregate sales from donations can do so in a reasonable and not a financially burdensome manner which will be acceptable to and comply with the statutory and regulatory requirements of the California State Board of Equalization. SBE submits it is only an organization which tries to create the appearance of an intolerable burden in order to avoid paying a tax that will assert that it is unable to reasonably accommodate the needs of the California taxing authorities without an undue and unreasonable entanglement of tax administration in religion. Paying California sales and use tax did not here and will not create any substantial administrative burden, let alone any "entanglement."

JSM's concerns regarding the potential of complying with hundreds of different tax rates is eliminated by its concession that during the period in issue, only California (with a single rate and law [JA 176]) taxes JSM mail order sales outside Louisiana (B of A 13-14). SBE further submits that today's computer technology and the present extensive and expensive accounting talent already paid by JSM should be able, with a relatively small amount of time and cost, to incorporate any necessary sales and use tax reporting requirements into its current computerized mail order sales business activities. The uncontroverted evidence in the record simply does not support JSM's excessive entanglement claims.[25] JSM and many of its supporting amici contend that the burden of

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[25] JSM tries to sidestep the effect of the *Hernandez* case by saying that a deduction differs from a tax. Of course it does.

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collecting the tax would lead to recurring, intricate and intrusive interactions between religions and government officials which would raise inhibiting and entanglement problems under the Free Exercise and the Establishment Clauses, respectively. (B of A 35.) This argument is not supported by any evidence in the record and is just wrong.

JSM contends that the apparent burden (administrative cost)[26] of collecting the tax will chill or inhibit religious organizations from entering a state to conduct religious activity or it will cause religion to curtail certain programs due to having less money after paying costs. Even were this true, would it invalidate a neutral, nondiscriminatory tax? Certainly not; or every tax would be invalidated for having substantial economic bu.dens which may affect one's action. The free exercise is not offended when a tax burden could affect one's choice of

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However, any individual contributing to a religious organization will want to be able to deduct that contribution for income tax purposes. Conversely, any religious (or other charitable) organization soliciting donations will certainly wish to provide its donors with the necessary information to allow the donor to take a proper deduction, if for no other reason than to induce greater donations. JSM claimed in 1981 it was already separating out donations for each individual, and can use this same information for use tax purposes. Surely JSM intends to do so in the future.

[26] Amicus Watchtower (p. 5) suggests that the potential of every adherent obtaining a permit would be burdensome. California addresses this situation by treating the umbrella organization of the canvassers or door-to-door ministers in this situation as the retailer (rather than each individual) for sales and use tax purposes. (R & T Code, § 6015.)

conduct. (Only when it makes one choose between violating a religious tenet or a government requirement, need the tax be justified under *Lee*.) It apparently does not invalidate income, property, employment, transportation, gasoline and other taxes collected regularly from persons engaging in religious activities.

This court in *Bob Jones University v. United States* (1983) 461 U.S. 574, 603-604, wnich involved the exempt status of a religious school, stated that "denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing religious tenets." There is no evidence that any burden from California's sales and use tax would be substantial, let alone prohibit any one from practicing his or her religion or prohibit JSM from conducting its programs. (JSM paid substantially more for luxury cars and airplanes, executive salaries, and in "loans" to the Swaggart family than for California taxes ([Trial Exh. 51, 52].) JSM showed no adverse effect on its "core" activites from the taxes here.)

JSM's concerns regarding entanglement are similarly overstated. This court held in *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985) 471 U.S. 240, 305-06 that the Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations. The court went on to hold that " . . . the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs."

Any requirements associated with the sales and use taxes are the same for any organization and since any

compliance burdens are imposed and operate evenhandedly, they are not constitutionally impermissible. (*Larson v. Valante* (1982) 456 U.S. 228, 253.) This court held in *Hernandez* that the application of neutral tax laws to religious groups does not cause impermissive entanglement in religion. (109 S.Ct. at 2147-48.)

JSM's claims of potential entanglement due to alleged disputes over donative intent, selective enforcement and misconduct of government agents are unsupported by the record and are improper. JSM and its amici attempt to raise these concerns to a level of continuous onsight monitoring disfavored by this court. The facts just do not support such conduct.[27] This court in

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[27] JSM expressed concerns about agents of the state (B of A 41), as did two amici briefs (Association for Public Justice 17) and National Council of Churches regarding alleged conduct of SBE auditors regarding an ISKCON audit. The audit discussed (1980) was not even part of the ISKCON action now pending in the California Court of Appeal which involves the years 1973-1979. (See ISKCON Amicus Brief, pp. 4-5.) It is unknown whether these allegations are correct, and obviously only their version is being presented. There is no evidence in the record concerning these allegations, and accordingly they should be disregarded.

JSM's claim (not found in the record) that SBE auditors spent "2-3 weeks" on this (B of A 37, fn. 42) is far from "continuous oversight" and is no unusual burden on a business type organization of the nature and type JSM was.

JSM's extensive discussions of taxes used as "device[s] for the suppression of religious minorities" and implications that it was a threatened, unpopular, itinerant minister (B of A 11-13, 35, 41-42) have no place in this proceeding. The record clearly shows otherwise, i.e. it is JSM that is seeking special tax immunity not given by California to anyone, including small itinerant and large established religious organizations like JSM

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Hernandez disposes of any problems regarding determination of donation versus sale (109 S.Ct. at 2147-48). This analysis is similarly applicable here. The SBE never followed the Attorney General Opinion (JA 26) which found the sales and use tax unconstitutional on the facts in that opinion and which is not even followed by the Attorney General today. (See fn. 16, *supra.*)

Finally, some amici have hinted that sales and use taxes violate the Establishment Clause because they create a preference to those religions that do not raise money through selling books. This court in *Bob Jones University v. United States, supra,* 461 U.S. 574, 604 n.20, observed that a secular regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions. This court in *Hernandez, supra,* 109 S.Ct. *2147,* recently rejected a similar preference contention regarding the disallowance of a deduction. For the same reasons, the preference contention must be rejected here.

IV

THERE ARE NO NEXUS PROBLEMS HERE

A. Nexus Should Not Be Considered.

The California courts specifically ruled that JSM did not properly raise the question of Nexus and declined to

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(which was related to Assemblies of God – JA 108-09). SBE's requests to register were proper (see fn. 7, *supra.*) There is no evidence of any selective enforcement against JSM or between established religions and less conventional ones. The California sales tax and use tax have been in existence since 1933 and 1935, respectively, and have been applied uniformly to all religions and others. (JA 22.)

rule on that issue. (JA 252-255.) Nexus is not an issue properly before this court and should not be considered.

B. Activities in California Conceded by Plaintiff Show Sufficient Nexus to Require Collection and Remittance of Use Tax by Appellant as Seller.

California clearly has jurisdiction to tax sales made in California at crusades.[28]

JSM averaged over three crusades a year with $10,000 merchandise sold in two to three days of selling at each such crusade. Appellant asserts (incorrectly) that it had "no other contact with California other than the crusades described [above] and the mail order sales," except a representative from 1978 through 1981 "counseling adherents." (B of A 36.)[29] The evidence presented in

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[28] Appellant sold $240,000 worth of merchandise at its crusades in California. JSM brought these goods here in its own trucks, displayed them for sale, delivered them to customers and collected payment, i.e., performed the entire sales transaction for each item in the State of California. Appellant concedes that California has Nexus (jurisdiction to tax) (B of A 16).

[29] Even were the foregoing the only contacts with California (which they are not), they would be sufficient to require collection of the use tax on mail order sales. The most recent, leading and factually closest case is *National Geographic Society v. Cal. Equalization Bd.* (1977) 430 U.S. 551 (hereinafter *"National Geographic"*). The mail order sales in *National Geographic* (also a "nonbusiness" public benefit corporation) and here, appear to have been conducted in similar respects. In addition, *National Geographic* had only two advertising offices in California which had nothing to do with its mail order sales. This was held sufficient nexus to require collection of use tax by National Geographic on the mail order sales. Here, there was admittedly

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this case shows substantially more extensive California contact.[30]

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at least one representative of the seller who was in California as such for at least four years. Being a permanent resident of California, he necessarily had a California office or place of business from which he operated. There appears to be no substantial difference between having one or two non-selling offices in a state; each had a continual presence here and was enjoying substantial benefits of this state; the results should be the same here as in *National Geographic* on the basis of these facts alone. However, there were substantial additional contacts by appellant here with California which were not considered in *National Geographic*.

[30] Some of the musical tapes and speeches which were sold by JSM were recordings of events at the crusades themselves (JA 20); thus some of the recordings sold to Californians were recorded here. At the crusades there were solicitations of sales (JA 20, 54); the same items were sold both at crusades and by mail order (B of A 7); thus the crusade activities also constituted intrastate activity in California soliciting mail order sales to persons attending the crusades (and to Californians listening to intrastate live broadcasts of California crusades). JSM's broadcasts (which include solicitation of sales) were made through local California stations, including *cable* television stations located throughout California. (Exh. 15, June 1981, p. 15.) (Cable television is obviously intrastate and extensively uses local California cable television distribution facilities. Users of local television (especially cable) enjoy substantial locally provided governmental benefits for which California may request payment of taxes.)

Appellant's crusade caravans brought into California, displayed and sold here on a recurring basis the same merchandise which it was simultaneously offering to its customers by mail order activities; thus, JSM's crusade sales activities complemented, aided and stimulated its mail order sales and vice versa.

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The court in *National Geographic* points out that "states necessarily impose the burden of collecting the tax on the out-of-state seller; the impracticality of its collection from the multitude of individual purchasers is obvious." (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at p. 555.) After citing *Standard Pressed Steel Co. v. Washington Rev. Dept.* ((1975) 419 U.S. 560, which found nexus where a single consultant was present in the state) and other cases upholding nondiscriminatory

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Appellant's presence in California for crusade purposes was obviously not limited to the two-to-three day crusade dates, as appellant implies. Advance personnel arranged for crusade locations, hotels, contacts with local churches and clergy, advertising and other arrangements. (JA 67-68.) Extensive equipment was trucked into California and set up in advance of crusade dates; it was taken down later and moved to other crusade sites within California. (JA 20.) This shows not only substantially longer periods that appellant's employees were actually present in California in connection with crusades at which sales were made, but that there was a substantial and extensive use of local California facilities such as large auditoriums, police assistance for large meetings, utilities, highways, and local advertising media to publicize the crusades to local persons.

One of appellant's witnesses testified that when he was a minister of a local church in Florida, he was a representative of appellant also (JA 92); and after he became JSM "crusade director" he would "go to" the crusade location, talk to pastors of local churches, set up all the different chairmen and ministries involved in that crusade (JA 67-68); this suggests that local ministers and other California residents performed extensive representation of appellant here for purposes of arranging the crusades in California at which JSM sold substantial amounts of merchandise to persons who through such activities came to the sales locations (the entry ways through which attendees must pass to and from the meetings). (See Brief of Amici MTC, et al. for further detail.)

direct taxes fairly related to the services provided the out-of-state seller, the court said that the basis for imposing on an out-of-state seller,

> " . . . a duty to collect a use tax is even stronger. [citing] The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing State is self-evident. The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it. [Citations]" (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at p. 558.)

The court then distinguished two cases which had found insufficient nexus, (a) saying in *Nat. Bellas Hess v. Dept. of Revenue* ((1967) 386 U.S. 753), there was absolutely no contact with the taxing state other than interstate mail order activities initiated from outside the taxing state; and (b) distinguishing *Miller Bros. Co. v. Maryland* ((1954) 347 U.S. 340), on the ground that the seller could not know whether the goods sold over the counter in Delaware were transported to Maryland (the taxing state) prior to their use. (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at 559.)[31]

The test stated in *National Geographic*:

> " . . . is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the state] and *the person* . . . it seeks to tax.'" (*Id.* at 561.)

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[31] A concurring opinion in *National Geographic* suggested that the *Miller Bros.* case be overruled. (*Id.* at 563.)

Such minimum connection clearly exists with JSM under the facts conceded and evidence presented in JSM's offer of proof. This, plus evidence which came from its witnesses and documents clearly show sufficient nexus exists.

JSM in its brief (A of B 18-19) contends that the effect of the use tax is similar to a fine apparently due to the magnitude of the use tax assessed in this case – $104,000. This is unsupportable because the use tax is 6% of the sales price and thus the $104,000 relates to mail order sales of $1,702,842 made in California and not to the sales receipts of $240,650 from the sales made at crusades in California. (JA 226.) There is no factual or legal relationship between the total use tax assessed on mail order sales and the value of material sold at crusades in California and any comparison is misleading and erroneous. Use of the crusades and other contacts as a nexus for use tax collection is not functionally identical to a flat license fee either factually or legally. This court in *Standard Pressed Steel* (*supra*, 419 U.S. 360, 564), held that a tax on gross receipts from sales to a local consumer is apportioned exactly to the activities taxed. This is exactly what the use tax is in this case.

If for any reason this court should choose to consider the question of Nexus and decide that the facts before it constitute insufficient Nexus, the Court should remand the case to the trial court to enable SBE to engage in necessary discovery to determine the remaining facts on this subject and present them at retrial to the trial court.

CONCLUSION

The issue properly before this court is simply the legal question whether the California sales and use taxes which fall upon sales by religious organizations of religious content materials are an unconstitutional prohibition of the free exercise of religion, under the broad language of *Murdock* and *Follett* (which have been so interpreted by some). This court should clearly indicate that sales and use taxes may be collected on sales by religious organizations of any tangible personal property, including tapes, books and records with religious content, both generally and as applied to JSM here. Other contentions made by JSM in its brief neither raise substantial federal questions properly before this court nor are they grounds justifying reversal of the decision below.

It is respectfully requested that the decision of the Court of Appeal be affirmed.

DATED: August 18, 1989

Respectfully submitted,

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Supreme Court of the United States

October Term, 1989

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

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REPLY BRIEF FOR APPELLANT

This case involves a tax on the exercise of religion. The more appellant spreads the gospel, the higher the tax and the greater the administrative burden. The greater those burdens, the less appellant will be able to spread the gospel. Never has this Court countenanced so palpable an invasion of the religious freedom protected under the First Amendment. Appellee attempts to defend this tax by recasting the facts of the case, by suggesting an erroneous standard of review, and by presenting constitutional arguments at odds with this Court's precedents. Those arguments should be rejected, and the churches of America restored to their former status of independence from government force or favor.

I. The Facts

1. *Religious materials.* In our opening brief, we stated that the "only materials at issue are books, pamphlets, tapes, and records with specific doctrinal or worship-related content." Br. 21; see also Br. 3-4 (describing the materials in detail). Appellee, the Board of Equalization of the State of California, contradicts this statement, pointing out that appellant also sold a variety of non-religious items (T-shirts, pens and pencils, etc.), and claiming that "[l]ittle of the merchandise sold by JSM" is directly related to the tenets of its faith. Bd. Br. 9, 10-11, 35. The Board thus attempts to argue a case different from that presented to this Court.

The record clearly reflects (J.A. 59-60), and the Board acknowledges in a footnote (Bd. Br. 8 n.8), that appellant did not contest, and agreed to pay tax on all items that "do not have specific religious-message content." See Br. 3 & n.2. Throughout this litigation appellant has claimed constitutional immunity *only* for the nonprofit, noncommercial distribution of doctrinal or worship-related materials, and both lower

courts decided the case on that basis. J.S. App. A10-A11; J.A. 213-14.[1] The nonreligious materials treated at such length by the Board (which were in any event exceedingly minor in number and value, see Br. 3 n.2) are not at issue in this proceeding.

2. *Uncontradicted evidence of entanglement.* In our opening brief (Br. 35-45), we demonstrated (based on evidence in the record with specific supporting citations) that administration of the sales and use tax during the period in question (1974-81) was unduly burdensome and entailed extensive and intrusive entanglement between religious and governmental authorities. This evidence was uncontradicted; indeed, it was corroborated by evidence offered by the Board.[2] In its brief, the Board attempts to counter this demonstration with the assertion that "[b]y 1981, JSM was an expertly staffed business-type computerized operation which claimed that it segregated sales from donations for income tax reasons." Bd. Br. 36 & n.24.

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[1] To be sure, appellant's worship-related materials include religious music, both vocal and instrumental, and its religious teaching touches on issues of morality such as alcoholism, homosexuality, personal finances, and marriage, as well as the spiritual experiences of well-known Christians, such as Jerry Lee Lewis. If the Board is taking the position that these are "non-religious" (see Bd. Br. 9-10), that position borders on the frivolous. Moreover, it is irrelevant that appellant's publications contain advertisements for employees and publicize broadcasts (Bd. Br. 10), since those publications are not subject to tax under state law and are therefore not at issue in this proceeding. See Bd. Br. 18 n.15.

[2] The Board's district administrator in charge of this case testified that the recordkeeping and accounting practices required by the statutes and regulations, when not "avoided" by prior agreement between the taxpayer and the Board (in the Board's sole discretion) were "burdensome." J.A. 176-77. This contradicts the Board's assertion in its brief (at 35) that "[t]here was and should be no substantial burden in reporting California sales and use taxes." Moreover, the Board admits that an on-site audit lasting 2-3 weeks (by just one taxing jurisdiction out of 7,000) "is no unusual burden" (*id.* at 41 n.27). Evidently, the Board's notion of burden is different from the taxpayer's.

This submission by the Board is both erroneous and inappropriate. First, the Board's vague references to "[b]y 1981" and "after 1981" indicate that it is referring to developments mostly *after* the tax period at issue, notwithstanding its own motion *in limine*, granted by the trial court, barring evidence subsequent to the tax period. Tr. 12. Second, the Board's supporting citation – to Exhibit 15, a notice in the June 1981 issue of appellant's magazine, *The Evangelist* – was *not* admitted "for the truth of the matters asserted" (again, on the Board's own motion). Tr. 32, 36. The Board cannot flaunt the rules of evidence at its own convenience, while falsely accusing appellant of "regularly go[ing] outside the record to support its position" (Bd. Br. 13).[3] Finally, the exhibit cited actually contradicts the Board's claim.[4] It is a notice to appellant's supporters, dated June 1981, describing appellant's *future* plans for an improved, but still rudimentary, computerized recordkeeping system. By the description, the system could not keep up with the varying requirements of 7,000 sales and use tax jurisdictions. Indeed, evidence in the record demonstrates that would be virtually impossible for a religious ministry. J.A. 207-12.

3. *Fixed price v. donations*. The Board refers (Bd. Br. 8) to certain of appellant's publications, which offer items for

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[3] The only examples the Board supplies to support its accusation are found at Bd. Br. 13 n.13. First is our statement that appellant paid for the cost of municipal services received. This statement was supported in our brief with citations to municipal ordinances, matters of public record (Br. 5-6 n.3). Second is a supposed statement that "California does not tax sales by other religious organizations" (citing Br. 40). What we said on the cited page is that it "is not likely" that "the states" will tax the full variety of sales by religious organizations uniformly. Br. 40. The Board's propensity for accusations of bad faith and threats of criminal prosecution (Exh. 47, J.S. App. E1-E2) help to demonstrate why the entanglement with the state caused by this tax seems so threatening to religious organizations.

[4] For the Court's convenience, we have reproduced the cited page from Exhibit 15 as Appendix A to this reply brief.

sale at a fixed price. The Board then asks this Court to infer that all of appellant's "sales" were for a fixed price – an assertion squarely contradicted by the record. J.A. 166-69; see our opening brief, at 4. Even the same item "may have been offered dozens of different ways." J.A. 169, Tr. 171.

II. The Standard of Review

The Board contends that this Court's review of the lower court's ruling on the Establishment Clause issues must be based on a "substantial evidence" test. "[I]f there is substantial evidence in the record (ignoring all conflicting evidence to the contrary) which supports the California courts' determination that JSM failed to establish any violation of the Establishment Clause in the application of the tax in issue, this ruling should be affirmed." Bd. Br. 4; see also *id.* at 11-12. This completely misconceives the nature of appellate review of a claim of unconstitutional entanglement.

The holding below, that the sales and use tax does not "involve the government with an excessive entanglement with religion so as to violate the Establishment Clause" (J.S. App. A29), is not a finding of primary fact. It is a conclusion of law, and is freely reviewable by an appellate court. This Court has repeatedly held that appellate courts in First Amendment cases must independently review the entire record. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984) (citing cases). For example, in *Aguilar* v. *Felton*, 473 U.S. 402, 407-08 (1985), the district court rejected claims of entanglement on the basis of its review of the evidentiary record; the court of appeals reversed; and this Court affirmed. In so doing, the court of appeals and this Court relied on the "conflicting evidence" as well as the evidence in support of the judgment below. In *Lemon* v. *Kurtzman*, too, this Court declined "to accept the District Court's express findings" on the entanglement question. 403 U.S. 602, 666 (1971) (White, J., dissenting). The entanglement doctrine is prophylactic in nature; the question is whether a particular government policy

is " '*apt* to entangle' " church and state or poses a "*potential* for excessive entanglement." *Lemon*, 403 U.S. at 615 (emphasis added), quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 695 (1970). This Court is not bound by the trial court's assessment of the potential for entanglement in this case.

III. Use Tax Issues

1. *Commerce and Due Process Clauses: Procedural Argument.* Prior to this case, the State of California took the position that the distribution of religious materials by a religious organization is constitutionally immune from sales or use tax. *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980) (sales and use tax); *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 213 Cal. Rptr. 98 (1985) (sales tax only). The Board now describes this Opinion of the Attorney General as "obsolete" (Bd. Br. 20 n.16), though it was issued in 1980, the penultimate year of the tax period in question, and claims that the *Institute* case was "superseded" by the decision below (Bd. Br. 14), though the two decisions were rendered by coordinate divisions of the appellate court. When this case began at the administrative level, however, appellant did not foresee that the Board would so quickly repudiate the position of the State's chief legal officer. Accordingly, appellant initially relied on this simple, dispositive point of law. After the Board's adoption of a new constitutional standard, it became necessary for appellant to address other defects in the Board's finding of tax liability. See *Hibernia Bank* v. *State Bd. of Equalization*, 166 Cal. App. 3d 393, 212 Cal. Rptr. 556 (1985) (allowing taxpayer to raise new issues because of intervening change in the law even though not contained in the claim for refund). One of those defects is the lack of sufficient nexus for taxation under the Commerce and Due Process Clauses.

Appellant raised the Commerce and Due Process Clause issue at its first opportunity after learning of the Board's final decision to reverse the State's prior position on the First Amendment question, and again at every stage in the

litigation (Br. 17 n.12). The Board has responded on the merits.[5] The California courts have had every opportunity to rule on the issue. Indeed, the Court of Appeal initially decided the nexus question on the merits (J.S. App. A35-A37), later deleting that portion of its opinion (J.S. App. A41).

In its brief, the Board makes a half-hearted claim, without citation or explanation, that "[n]exus is not an issue properly before this court and should not be considered" (Bd. Br. 43). But under this Court's precedents, a party cannot avoid resolution of federal constitutional questions on the basis of state procedural rules "unless the procedural rule is 'strictly or regularly followed.' State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to *all* similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982), quoting *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) (emphasis added). In *Hathorn*, the Court entertained a claim that was raised for the first time in a petition for rehearing before the Mississippi Supreme Court. Here, appellant raised the question at every stage in the litigation.

The requirement of exhaustion of administrative remedies invoked by the court below is frequently waived or disregarded by the California courts. In this very case, the Court of Appeal applied the requirement selectively, ruling on the merits of appellant's Ninth and Tenth Amendment claims, despite the fact that these claims were in a procedural posture

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[5] The suggestion by *amici*, the National Conference of State Legislatures, *et al.* (at 12), that the Board was somehow deprived of the opportunity to ascertain the facts about nexus, must be rejected. The Board's audit staff conducted an investigation of the nexus question, which was reviewed by the Board's lawyers and formed the basis for a formal report. J.A. 20-21. The Decision and Recommendation of the hearing officer expressly addressed the nexus issue, notwithstanding the fact that appellant had not raised the question. J.A. 22. See also J.S. App. F6 (staff analysis of nexus issue). Appellant's challenge is to the sufficiency, as a matter of law, of the contacts *as found by the Board*. Consideration of appellant's legal arguments did not and does not require additional fact-finding.

identical to the Commerce and Due Process claims. *Compare* J.S. App. A37-A39 (ruling on the Ninth And Tenth Amendment claims) *with id.* at A41 (striking sections of the opinion ruling on the Commerce and Due Process Claims). This is not unusual. Under California practice, the courts retain the authority to hear claims "involving important questions of public policy," notwithstanding the parties' failure to raise those claims before an administrative agency. *Lindeleaf* v. *Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 870-71, 718 P.2d 106, 112 (1986), 226 Cal. Rptr. 114, 124; see *Hale* v. *Morgan*, 22 Cal. 3d 388, 394, 584 P.2d 512, 516 (1978), 149 Cal. Rptr. 375, 379, and cases cited therein.[6]

California courts are particularly willing to entertain *constitutional* challenges not raised before administrative agencies, since those agencies are expressly denied authority under the California Constitution, Art. III, § 3.5, to "declare a statute unenforceable, or to refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional." See *Regents of the University of California* v. *Public Employment Relations Bd.*, 139 Cal. App. 3d 1037, 1041-42, 189 Cal. Rptr. 298 (1983) (procedural history after remand omitted). The purposes of the exhaustion requirement are not served if the administrative body has no authority to rectify its errors. An aggrieved citizen cannot be expected to expend time and resources on a futility. See *State of California* v. *Superior Court*, 12 Cal. 3d 237, 250-51, 524 P.2d 1281, 1289-90, 115 Cal. Rptr. 497, 505-06 (1974) (rejecting claim that constitutional challenge, both facial and as applied, was barred for failure to exhaust administrative remedies); see also *California Public Utilities Comm'n* v. *United States*, 355 U.S. 534,

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[6] The Board's supporting *amici*, six organizations of state and local governments, attest that the nexus issue in this case is of "enormous" importance to state and local governments (Am. Br. 2). By the same token, it is important to nationwide religious ministries and other potential taxpayers, as our supporting *amici* demonstrate. The Board would therefore be hard pressed to deny that this case fits within the "important questions of public policy" exception.

539-40 (1958); *Park 'N Fly of San Francisco, Inc.* v. *City of South San Francisco*, 188 Cal. App. 3d 1201, 1208-09, 234 Cal. Rptr. 23, 28 (1987).

2. *Commerce and Due Process Clauses: Substantive Arguments.* On the merits of the Commerce and Due Process nexus argument, the Board contends that appellant had additional contacts with the State beyond its evangelistic crusades, sufficient to constitute nexus. Most of the additional contacts cited by the Board were incidental to the crusades: the taping of music and preaching at the crusades, the distribution of religious materials at the crusades, the traveling to and from the crusades, the setting up at the crusades, and the contact with local churches to promote the crusades. See F Br. 44-45 n.30. These contacts are no less occasional and episodic than the crusades themselves, and add nothing to the Board's assertion of nexus.

In addition, the Board cites several other contacts not relied upon by the decisions under challenge. The first such contact is appellant's use of broadcasting and cable television for solicitation of "sales" (Bd. Br. 44 n.30). But such contacts did not become a statutory basis for assertion of taxing authority under California law until six years after the tax period. See Cal. Rev. & Tax. Code § 6203 (e), (i), Cal. Stat. 1987, Ch. 1145 (eff. Jan. 1, 1988).[7] The second, and final, such contact is appellant's employment of a minister, who was engaged in wholly non-commercial counselling within the State for four of the years in question. Bd. Br. at 43-44 n.29. To uphold nexus on this basis would be a major stretch beyond *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977). While unrelated business activity is a basis for imposing use tax collection liability (*id.*), this Court has never held that non-business, non-

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[7] Nor would such contacts be sufficient under the Commerce and Due Process Clauses. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967) (use of instrumentalities of interstate communication for advertising not sufficient nexus for taxation).

commercial activity has any significance for Commerce Clause or Due Process purposes.[8]

3. *The First Amendment Nexus Argument.* The Board largely disregards appellant's principal argument regarding nexus, which is that it violates the Free Exercise Clause to attach a large financial consequence to the exercise of the right to conduct religious worship services in the State of California. This is an alternative ground for decision, entirely independent of the Commerce and Due Process arguments.[9]

Under the Board's nexus determination, any national ministry that distributes materials through the mails to adherents in California will be inhibited from conducting religious meetings within the State, because such meetings will subject it to use tax liability wholly out of proportion to the extent of its in-state activity. The Board's response to this argument (if it can be called a response) is that "[t]here is no factual or legal relationship between the total use tax assessed on mail order sales and the value of material sold at crusades in California" (Bd. Br. 47). But that is precisely our point. The amount of the use tax liability *has no relation* – factual or legal – to the conduct of the crusades, and the crusades therefore should not be used as nexus. The effect is precisely

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[8] *Amici* the National Conference of State Legislatures, *et al.*, take the opportunity of this case to urge an abandonment of *National Bellas Hess* and replacement with a test based on "purposeful cultivation and exploitation of an in-state market." Am. Br. at 17, 20 n.9. Since this suggestion has not been made by a party to the litigation, we assume that the Court will continue to adhere to its precedents. Moreover, since Congress is actively engaged in consideration of the *National Bellas Hess* issue (H.R. 2230, S. Res. No. 80, 101st Cong., 1st Sess. (1989)), it is appropriate to leave major changes in the framework of the law to that body.

[9] The Board does not argue, nor could it, that the supposed procedural bar to consideration of the Commerce and Due Process Clause argument applies to appellant's First Amendment nexus claim. When appellant's counsel made an offer of proof on the nexus issue in trial court, counsel for the Board stated: "I object to it being used for any other purpose *other than the First Amendment*," and the evidence was admitted. Tr. 14 (emphasis added).

the same as the flat license fee struck down in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944). The use tax liability is unrelated to the income generated by the crusades, just as the flat fee was unrelated to the income generated by sales in *Murdock* and *Follett*. Using evangelistic worship services as nexus will deter itinerant preaching, since the mere act of entering a new state to preach will subject the ministry to a potentially incapacitating burden of tax and tax administration, which – according to the Board's theory – will continue long after the evangelistic mission has ended and the preachers have returned to their own state.

IV. Sales and Use Tax Issues

1. This Nation's commitment to a separation between church and state protects churches from government-imposed burdens on their religious activities even as it excludes them from government subsidies of their religious activities. The Board ignores the unbroken practice of the states and the federal government, dating back at least to the Founding, that religious bodies are immune from taxation on their property used for religious purposes, their income derived from activities related to their religious purposes, and the receipts derived from their provision of religious materials and services. This long-standing practice of the states has a clear constitutional foundation in the requirement of separation between church and state. See *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970), a precedent the Board conspicuously ignores.

The Board proposes a radical retrenchment of free exercise protections. According to the Board, "free exercise is not offended when a tax burden could affect one's choice of conduct." Only the direct conflict between a "religious tenet" and a "government requirement" falls under free exercise protection. Bd. Br. 39-40. This was the argument made, and rejected, 26 years ago in *Sherbert* v. *Verner*, 374 U.S. 398, 402, 404 (1963). See also *Thomas* v. *Review Board*, 450 U.S. 707, 717-18 (1981); *Hobbie* v. *Unemployment Comm'n*, 480 U.S. 136, 141 (1987).

The Board's argument is based on the premise that a tax on religious activity is permissible so long as it is generally applicable and does not single out religion. Bd. Br. 15, 16-17, 18, 19, 28, 29, 39, 40-41. Presumably, the Board would allow the government to impose the 34% corporate income tax on a church's "income" from the collection plate, or an "entertainment tax" on attendance at mass. Since these taxes are "nondiscriminatory," they would be constitutionally unassailable under the Board's revisionist interpretation of free exercise. By contrast, under this Court's interpretation of the Free Exercise Clause, unanimously reaffirmed last Term in *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514 (1989), the government may not burden the exercise of religion without compelling justification, even if the burden results from enforcement of facially neutral, generally applicable laws or policies, including taxes. See *Hobbie*, 480 U.S. at 141; *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. at 402 (specifically mentioning the taxing power). The Constitution's protections for free exercise necessarily extend beyond equal treatment of churches and commercial businesses. The powers of the state to regulate and tax commercial businesses are nearly plenary; its powers to regulate and tax religious bodies in ways that inhibit the exercise of religion are limited to the "least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718.

The inconsistency between this Court's decisions and the Board's interpretation of the Free Exercise Clause is most evident in the Board's reliance on dissenting opinions in this Court's leading free exercise cases: *Sherbert* (Bd. Br. 32), *Thomas* (Bd. Br. 32), *Murdock* (Bd. Br. 24), and *Follett* (Bd. Br. 24).

The Board's position is most clearly inconsistent with *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944). The Board contends that "generally applicable" taxes are constitutional, even when applied to the core religious activities of a church. Bd. Br. 31-35. Yet *Murdock* and *Follett* themselves involved general taxes, applied to commercial and religious vendors alike, without discrimination. See 319 U.S. at 115 ("The fact that

the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted"). The Board repeatedly describes appellant, an evangelistic ministry, as a "business-type" organization (Bd. Br. 36, 41 n.27), and insists that it has as much power to tax a church as it does a business. Yet *Murdock* held that a person or organization engaged in disseminating religious doctrine does not become a commercial venture merely because it accepts money to defray the costs of its evangelical work (319 U.S. at 111-112), and the First Amendment is not satisfied merely because the evangelist is treated no worse than a commercial bookseller (*id.* at 111, 115).

The Board attempts to distinguish *Murdock* and *Follett* on the ground that the license fee charged in those cases was collected in advance and involved larger sums. Bd. Br. 15, 21, 22, 23. We do not believe landmark constitutional decisions can be brushed aside so easily. Surely it would have been no better in *Murdock* and *Follett* had the evangelists been required to obtain their licenses at the end of the day. The imposition was the tax – not its timing. As to the magnitude of the tax, the Court drew no distinction, so long as the tax was more than "nominal" (319 U.S. at 114, 116).

The Board also distinguishes *Murdock* and *Follett* on the ground that they involved flat taxes, while the tax here is based on a percentage of actual receipts. Bd. Br. 24.[10] This is the same distinction that five Justices found unpersuasive in *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890, 906 (1989) (Blackmun, J., joined by O'Connor, J.); *id.* at 913 (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J.). While in some respects a flat tax is more onerous (on vendors with low volume), in other respects – particularly the administrative burden – the sales and use tax is more so. In any event, *Murdock* and *Follett* did not rest on the details of the tax. They were based on the general principle that the state cannot exact a price if the exercise of religion is to remain "free."

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[10] As noted above (at 9-10), the effect of using evangelistic worship services as a "nexus" for imposing use tax collection liability on an out-of-state ministry is functionally identical to a flat tax.

As if recognizing that its purported distinction of *Murdock* and *Follett* is untenable, the Board also advances the proposition that this Court's subsequent free exercise decisions have supported the dissenting opinions rather the opinions for the Court in those cases. Bd. Br. 24. Analysis of those decisions does not bear this out.[11]

United States v. *Lee*, 455 U.S. 252 (1982), did not, as the Board implies (Bd. Br. 26), hold that "government tax needs" always or necessarily outweigh "even direct interference by a tax with religion." *Lee* involved individual taxpayers whose objection was to the particular *use* by the government of their tax dollars. Acceptance of their claim would have opened the door to "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260), and would wreak havoc with administration of the tax system. The constitutional claim in this case has nothing whatever to do with varying religious beliefs; it is based on the structural separation between government and religion. The experience of every state since the inauguration of sales and use taxes (including California, until 1980) demonstrates that appellant's constitutional claim can be accommodated without disruption to the tax system.

Minneapolis Star v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), did not, as the Board claims (Bd. Br. 28), make *Murdock* and *Follett* inapplicable to general, non-discriminatory sales taxes. *Minneapolis Star* held only that *for-profit* newspapers are liable for taxation on equal terms with other businesses. This is evident from the Court's reliance on *Breard* v. *Alexandria*, 341 U.S. 622 (1951), which distinguished between commercial magazine vendors and noncommercial purveyors of religious materials. 460 U.S. at 586-87 n.9.

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[11] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), cited by the Board at Bd. Br. 25, is irrelevant to this case. To the extent that *Braunfeld* held that "legislation which does not make unlawful the religious practice itself" is largely immune from free exercise attack (*id.*), the decision was overruled by *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Nor did this Court's summary disposition of *Covenant Community Church* v. *Lowe*, 475 U.S. 1078 (1986), imply that transactions between a religious body and those who wish to receive its religious message are subject to tax. See Bd. Br. 28-29. *Covenant Community Church* involved the rental of hotel space by a for-profit secular entity to a church. Appellant does not deny that the commercial transactions of secular businesses are taxable; indeed, appellant pays taxes on purchases from secular suppliers.

The Board's reliance on *California Equalization Board* v. *Sierra Summit*, 109 S. Ct. 2228 (1989) (Bd. Br. 29-30), is particularly surprising. In *Sierra Summit*, the Court applied to the case of a bankruptcy trustee its current doctrine of intergovernmental immunities, under which states "can never tax the United States directly" but can tax private parties with which the United States does business. *Id.* at 2232 (citation omitted). The analogy to our case is that the government cannot tax a religious body directly (with respect to the religious activities that define the core of its existence), though it can tax outsiders with whom the church has a business relationship. The parallel to *Sierra Summit* would be the tax in *Covenant Church* – a tax on a hotel with which a church does business.

Hernandez v. *Commissioner*, 109 S. Ct. 2136 (1989), on which the Board repeatedly relies (Bd. Br. 33, 37-38, 38 n.25, 41, 42), is easily distinguishable from this case. Aside from the allegations of unequal application of the law, the taxpayer in *Hernandez* did not have even a colorable free exercise claim, for denial of a deduction left him neither better off nor worse off than he would have been if there were no income tax at all. Moreover, the tax in *Hernandez* was on income derived from secular sources. The decision has no bearing on the constitutionality of a tax on the religious activity itself.

Nor are *Bowen* v. *Roy*, 476 U.S. 693 (1986), or *Lyng* v. *Northwest Indian Protective Ass'n*, 108 S. Ct. 1319 (1988), cited at Bd. Br. 33, helpful to the Board. Those cases stand for the proposition that individuals have no free exercise right to control the government's own internal procedures or the use of the government's own land. Their logical corollary is that the Free Exercise Clause *is* implicated when the government seeks to regulate or tax

the internal processes of religious bodies, such as their dissemination of religious materials to adherents.

The Board also relies (Bd. Br. 40) on *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), in which this Court upheld application of a tax to a religious school. But the Board fails to point out that the tax in that case was justified by the compelling governmental purpose of eradicating racial discrimination in education. *Id.* at 604. Here, the state has shown no justification whatsoever, other than its preference for taxing appellant rather than tapping an alternative source of revenue. See *Braunfeld* v. *Brown*, 366 U.S. 599, 607 n.4 (1961) (plurality opinion per Warren, C.J.) (the license fees in *Murdock* and *Follett* were struck down "because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources"). Even the California courts have held that the need for revenue does not constitute a sufficient justification to override a free exercise claim. *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985) (not followed by the court below).[12]

Finally, the Board relies (Bd. Br. 40-41) on *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 240 (1985), in which this Court upheld application of wage and hour laws to a religious organization. This Court, however, made clear in *Alamo* that the requirements upheld in that case applied "only to commercial activities undertaken with a 'business purpose' " and that they had "no impact" on the Foundation's "evangelical activities." 471 U.S. at 305.

In short, none of the cases cited by the Board even remotely supports its position. For decades, this Court has

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[12] The Board denies that its interest in this case is "revenue raising," and asserts, instead, an interest in "uniform application" of the tax. Bd. Br. 33. We do not see why "uniform application" is of any importance in the abstract, apart from its impact on revenue, unless the administration of individuated exceptions would entail significant administrative burden or danger of arbitrariness. See McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 155-56 (1986). Recognition of a constitutional immunity in this context would entail no increased administrative burden.

held that governmental burdens on the free exercise of religion – even when they are evenhanded and generally applicable – can be sustained only if they are the least restrictive means of achieving a compelling governmental purpose. The Board wishes to reverse these precedents and return to the days before *Sherbert* and *Murdock*. Under the Board's approach, free exercise cases would be easy: the government would always win.

To adopt the Board's position would twist the Religion Clauses beyond recognition. As an original matter, putting aside the historical justifications for insulating religious bodies from state burdens and interference,[13] it would have been possible to read *both* Religion Clauses as the Board suggests: government actions are permissible so long as the same burdens and benefits are imposed on religious and nonreligious organizations alike.[14] But this Court has rejected this "religion-blind" reading of the First Amendment. Religious organizations must be denied government benefits that would further their "specifically religious" activities, even though the benefits are available on a neutral basis to religious and nonreligious organizations alike. *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); see *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2580-81 (1988). Similarly, religious organizations are immune from burdensome regulation and taxation, absent a compelling governmental purpose, where it would interfere with their core religious functions. *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); see *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987); *id.* at 341-42 (Brennan, J., concurring); *Murdock* v. *Pennsylvania*, *supra*; *Follett* v. *McCormick*, *supra*.

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[13] See generally M. Howe, *The Garden and the Wilderness* (1965); Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 352-69 (1984).

[14] This is the position long advocated by Professor Philip Kurland. See P. Kurland, *Religion and the Law* 112 (1962). Kurland himself states that his position "met with almost uniform rejection" and "the Supreme Court refused to have anything to do with it." Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 24 (1978).

The Court's interpretation has preserved the symmetry of the two Religion Clauses. The constitutional test is this: if it would be unconstitutional for the government to *subsidize* the distribution of materials such as these by an organization such as appellant, it is equally unconstitutional for the government to *tax* them. The benefits and the burdens of separation balance out. As this Court noted in *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970), the "hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." The Board's one-sided espousal of the religion-blind standard (applicable to free exercise but not to establishment) would destroy this symmetry. Religious organizations would enjoy none of the benefits, but bear all of the burdens, of separation between church and state. The net effect would be systematically disadvantageous to religion.

2. The Board also argues that the tax liability here is permissible because the incidence is on the recipients of appellant's materials and not on appellant itself. Bd. Br. 23 n.18. This is largely a matter of semantics. As an evangelistic ministry, appellant has the constitutional right to disseminate religious materials without hindrance from the state, and its adherents have an equally protected right to receive and use them.[15] It does not matter which party to the transaction is inhibited. It is the transaction itself – the *exercise* of religion – that enjoys constitutional protection. Thus, the legal incidence of the tax is irrelevant to the free exercise claim.

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[15] The Board complains of our use of the expression "adherents," since appellant distributes materials to all who wish to receive them. Bd. Br. 9. We do not use the term "adherents" in any technical sense. Just as the "adherents" of a church include those who go to hear the sermon (even though the doors are open to all), the adherents of an evangelistic ministry include those who request and obtain the message (sermon tapes, religious music, Bibles, tracts, and so forth). We use the term "adherents" to distinguish the distribution of religious materials *within* the religious community from transactions with secular outsiders, such as commercial publishers or bookstores, whose relationship to the church is commercial rather than religious. We do not challenge the state's authority to tax transactions with secular outsiders.

Moreover, no matter what the legal incidence of the tax may be, the administrative burden falls on the "seller." Thus, the Board's characterization of the tax has no effect on appellant's claim of unconstitutional entanglement.

3. In addition to its attempt to reverse decades of free exercise precedents, the Board portrays appellant's position as far more sweeping and revolutionary than it is. In fact, appellant's position requires nothing more than reaffirmation of long-standing precedents. Notwithstanding the careful delimitation of our position in our opening brief (at 25-26), the Board claims that our position would lead to constitutional immunity from all taxes bearing on religious organizations, including telephone taxes, airline landing fees, gasoline taxes, transportation taxes, and taxes on the acquisition of raw materials. See Bd. Br. 32 n.21, 34 n.22, 40.[16] But different taxes raise different constitutional issues.

Some taxes bear upon the church's participation in the secular commercial world and are therefore within the state's taxing power. When religious organizations venture beyond their religious core, they become subject to generally applicable laws, both imposing burdens and conveying benefits (see our opening brief at 26-31). Thus, taxes on transactions between churches and secular entities (telephone taxes, airline landing fees, gasoline taxes, taxes on raw materials, transportation taxes, and the like) are not constitutionally

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[16] The Board also claims that immunity would have to be extended to the "speech activities of non-commercial organizations and individuals designed to promote the moral, philosophical, environmental, educational, literary, and scientific well being of the world." Bd. Br. 32. This is simply not the case. The free exercise of *religion* does not extend to non-religious activities. *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514, 1517 (1989). Our point, which the Board has attempted to distort, is that immunity for speech on *religious* issues must be extended to nontheistic or philosophical as well as theistic speakers. Br. 23 n.18, 47-48. In this, we have adopted the position of Justices Blackmun and O'Connor in *Texas Monthly*, 109 S. Ct. at 906. Whether the Free Speech Clause extends similar protection to noncommercial advocacy speech of a nonreligious nature is beyond the scope of this case.

problematic, even though they increase the cost of religious activity.

Moreover, some taxes are relatively simple and straightforward, and create little danger of intrusive, continuing, or hostile interactions between religious and governmental authorities. Sales and use taxes are not among them. The complications of dealing with the shifting laws of some 7,000 taxing jurisdictions, coupled with the uncertainties of determining "cost" and "price" and distinguishing between "payment" and "donation," render the sales and use tax one of the most complicated and entangling of all taxes. Our opening brief (at 35-45) details the ways in which enforcement of this tax will entail frequent and intrusive monitoring, on-site investigations, audits, and negotiations, touching on matters of religious significance. Dealing with one jurisdiction (California) has proven difficult enough. If the decision below is affirmed and other states and localities impose taxes on the distribution of religious materials by out-of-state evangelistic ministries, the administrative burden and conflict will overwhelm all but the largest such organizations.

CONCLUSION

For these reasons, and those presented in our opening brief, the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, should be reversed.

Respectfully submitted,

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September 20, 1989

APPENDIX A

From *The Evangelist*, June, 1981, p. 23 (Exh. 15)

To Our Many Friends . . .

We apologize if our "growing pains" have inconvenienced you in any way, either in responding to your correspondence or in processing an order. We would never purposely be lax in our conduct.

The cartoon above pretty well describes the situation of Jimmy Swaggart Ministries. However, we certainly do not want to slow down. But yet the growth we are experiencing constitutes growing pains.

Last year the organization grew nearly seventy percent. That type of growth is so huge that anyone, even a major corporation, would have extreme difficulties with it. Here are the problems we are having at present.

We are unable to get the receipts to you for your donation as quickly as we would like. The computer now is so overloaded that it is just not large enough to handle this tremendous growth. I realize sometimes that people erroneously think we are not attending to our business, but that is not the case at all. We are working furiously almost around the clock to rectify these problems. I only ask your understanding.

We have just brought in a team of computer experts that we feel will help us to do the things that we desperately need to do, but it is going to take several months to work it out. If you can envision over one million names on our mailing list, and all the tremendous volume that entails, then you can possibly understand our difficulties. The things I am about to say are a part of the goal we are trying to arrive at. I cannot for lack of space list everything, but by the grace of God we

are getting there. At long last we feel we have the right people for the job. It is a monumental undertaking, but for the sake of souls we have no alternative or choice.

Our goals are:

To get receipts to you for your donations in a matter of days after receiving your gift.

That amount on the receipt be correct, even specifying (If need be) what the donation is for.

To be able to give you a total account of your giving at any time that you would request it.

To give you a year-end receipt for all your giving for the past year for income tax purposes.

To process all items so we know at all times exactly what you have asked for, how it is being processed, and when it is being shipped . . . and to do it immediately.

To be able to clean up our mailing list to the extent that what is requested will be sent and not duplicated.

To be able to respond, above all, to your spiritual needs as quickly as we should, because that is the main purpose of our effort and ministry.

There are many other things that we could name that will be attended to. These are the goals we are striving toward. It is a big job. The tremendous growth has caused problems, but these are problems we are glad to have. Until the World Ministry Center is completed (about a year from now), we will have to live with these crowded conditions that cause inconvenience. Please have patience with us. Thank you for your kindness.

Isaiah 54:2 declares: "Enlarge the place of thy tent, and let them stretch forth the curtains of thine habitations: spare

not, lengthen thy cords and strengthen thy stakes." We are attempting to so this, and with your help and understanding we will be victorious and successful.

/s/ Jimmy Swaggart
Jimmy Swaggart

(4)

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1374

In the Supreme Court of the United States

October Term, 1988

The Jimmy Swaggart Ministries,

Appellant,

v.

Board Of Equalization of California,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR PUBLIC JUSTICE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Are the Religion Clauses in conflict with one another?

II. Does the Free Exercise Clause, interpreted through the lens of the history of the struggle for religious freedom in this country, require a constitutional immunity for churches from sales and use tax imposed on the proclamation of a religious message and on the distribution of religious literature?

III. Is the Establishment Clause violated when the government passively refrains from collecting revenue from the churches in recognition of their constitutional immunityfrom sales and use tax imposed on the proclamation of a religious message and on the distribution of religious literature?

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STATEMENT OF INTEREST

The Association for Public Justice (APJ) is a nationwide nonprofit citizens' organization. Founded in 1973, APJ is headquartered in Washington, D.C. The purpose of APJ is to address issues of structural justice in many areas of public life, including issues of religious expression. APJ believes that as a matter of historic principle the two Religion Clauses of the First Amendment complement one another in a manner that makes possible the nondiscriminatory treatment of all religious groups, as well as the protection of the public's well-ordered concord.

SUMMARY OF ARGUMENT

Members of this Court have, on various occasions, expressed the laudable desire to harmonize the values protected by the two provisions of the religion clause. Taken together, the free exercise and nonestablishment principles protect the freedom of voluntary religious choice and the integrity of religious bodies to manage their own affairs. An accommodation of religion, whether achieved legislatively for legitimate purposes or, as here, required as an implication of the free exercise principle, does not offend the nonestablishment principle. In the view of the amicus, the mutually reinforcing provisions of the First Amendment religion clauses act as a "double guarantee of religious liberty," and should not be regarded as being in hostile tension with one another.

The leading decisions that control this case are *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944). It would be an incorrect reading of these precedents to confine them to their precise facts and to conclude that the state has general authority to lay a tax on the direct communication of a religious message by a preacher to willing listeners. To do so is to miss the point of the intense struggle over licensing of the clergy that led to the enactment of the First Amendment. The point to be gleaned from that historical struggle is not simply that a particular form of taxation on the occupation of preachers was rejected, but that the church[1] must be free from the burden of taxation

on the core protected activity of preaching to willing hearers and distributing religious literature to willing readers. The state may not, moreover, convert this protected activity into a taxable commercial enterprise merely because religious adherents contribute money to the church's ministry.

The freedom of churches to announce their message to willing hearers is affirmatively mandated by the free exercise principle of the First Amendment Religion Clause. To impose sales and use tax on religious bodies for the transmission of a spiritual message would gravely inhibit religion. The government may not prevail against this claim merely by invoking the magic word, "taxation," because the governmental interest in the raising of general revenue is not sufficiently compelling to override the damage done to religious freedom by the imposition of this form of taxation. The state has readily available alternatives for revenue production far less burdensome to religious freedom than the transformation of the church into an agent of the state to collect and remit a complicated tax imposed on core protected activity.

Only if the two Religion Clauses are viewed as virtually nullifying one another may the state's recognition of limits to its taxing authority over the church be viewed as a violation of the Establishment Clause. The path of exemption - leaving the churches alone - is clearly the path necessary to avoid the danger of excessive entanglement. To impose a duty on churches to collect *sales tax* for the distribution of religious literature and sacred music gives the state power to define, regulate and supervise the life of the church in an essential ministry. To impose on churches the far more onerous duty of collecting and remitting *use tax* for each piece of religious literature they send to an out-of-state believer runs the risk of still further entanglement. Since it is not only permissible but mandatory to avoid excessive governmental entanglement with religion, prohibiting the kind of taxation at is-

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1 In this brief the term "church" embraces all religious bodies protected under the First Amendment.

sue here has a valid secular purpose and effect. The immunity of the church from this form of taxation thus avoids excessively entangling relationships between church and state, and serves the end of religious freedom.

ARGUMENT

I. The mutually reinforcing provisions of the First Amendment religion clauses act as a "double guarantee of religious liberty."

This case clearly serves as a vehicle for addressing *both* provisions of the Religion Clause. In *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) the Court invalidated a sales tax exemption that appeared to confer a benefit based on the content of speech, favoring a certain kind of religious viewpoint. Justice Blackmun noted that the Court had left open the question whether "the Free Exercise Clause suggests that a State may not tax the sale of religious literature by a religious organization." *Id.* at 906. That question is squarely presented here.

A plurality of three Justices ruled that the statute violated the Establishment Clause and that the exemption was not required by the Free Exercise Clause. A dissent expressing the views of three Justices urged that an exemption for religious purposes does not violate the Establishment Clause.

Justice Blackmun noted an apparent conflict or tension between these provisions: "The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden." *Id.* at 906 (Blackmun, J., concurring). In the view of Justice Blackmun, neither the plurality nor the dissent had resolved the relationship between the two provisions satisfactorily. The plurality opinion, in his view, "would resolve the tension between Free Exercise and Establishment Clause values simply by subordinating the Free Exercise value." *Id.* The dissent, in his view, "would subordinate the Establishment Clause value." *Id.* Amicus strongly shares

Justice Blackmun's desire that cases be decided "without sacrificing either the Free Exercise value or the Establishment Clause value." *Id.*

It is not always an easy task to harmonize the values protected by the two provisions of the Religion Clause. Much of the difficulty of this task, however, stems from imagining that the two clauses exist in a state of tension with one another, or even as polar opposites in a grand tug-of-war. According to this view, the Establishment Clause forbids government support of religion or at least a preference of one religious group over another, and the Free Exercise Clause mandates special consideration for religiously motivated dissent from otherwise applicable law. The one is thought to make the state aloof from the churches and the other to make the state deferential to them.

Once the First Amendment is thought of in this way, then the chief task of interpreting it is to devise a means of keeping one clause from swallowing the other. Members of this Court[2] and commentators[3] have noted that this approach has led to confusing and inconsistent results.

The view that the Religion Clauses are at war with one another is not supported by the text of the First Amendment itself, which contains only one main clause ("Congress shall make no law ....") and only one mention of the word "religion." The Framers no more intended to write a contradiction in terms into the Religion Clause (one provision "anti-religion," the other "pro-religion")

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2 See, e.g., *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

3 See, e.g., M. Tushnet, *The Constitution of Religion*, in *Red, White, and Blue: A Critical Analysis of Constitutional Law* 247-256 (1988); Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 63 Notre Dame L. Rev. 311 (1986); Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 Calif. L. Rev. 817, 839 (1984); and Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 Univ. of Pittsburgh L. Rev. 673, 680-681 (1980).

than they intended in the Free Press Clause to guarantee both the widespread dissemination of a variety of political opinions and the suppression, by means of prior restraint of criminal sanctions for seditious libel, of views unpopular with the current administration.

A more sensible view of the text and history of the Religion Clause is that both provisions safeguard religious liberty by limiting the power of government over religious groups and over the freedom to be associated (or not to be associated) with these groups.[4] The two clauses should be read as parallel and complementary. In effect, the one protected from a national tithe and the other, from a national dogma. Taken together, both clauses serve to foster freedom of religious choice without governmental involvement in religious matters.

In *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 644 (1970), the Court acknowledged that the two Religion Clauses "would tend to crash with one another" if either or both of the provisions were "expanded to a logical extreme." *Id.* at 668-689. But in the same breath the Court recognized the need for "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" *Id.* at 669.

On June 25th, 1988, the bicentennial of the call for a Bill of Rights, prominent national leaders of diverse political and religious perspectives signed a document in Williamsburg, Virginia, to celebrate and reaffirm the meaning of the Religion Clauses.[5] Known as the Williamsburg Charter, this document is fully aware of the danger of combining the functions of church and state:

"In a constitutional order in which the roles of the

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4 See, e.g., Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Pub. L. Forum 325, 337-338 (1985).

5 Because the Williamsburg Charter offers an opportunity to undertake fresh analysis of the Religion Clauses, amicus cites relevant portions of this document at length in this brief. A copy of the document has been served on the parties and has been deposited with the Librarian of the Court.

> government and religion are so intertwined as to be virtually indistinguishable, the temptation is that either the church or the state may succumb to coercion in their claims over minds and souls. When these institutions and their claims have been combined, it has too often resulted in terrible violations of human liberty and dignity. They are so combined when the sword and purse of the State are in the hands of the Church, or when the State usurps the mantle of the Church so as to coerce the conscience and compel belief."

The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses, at 10 (1988).

Recognizing this historical danger, *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947), the framers of the First Amendment strove to prevent the misordering of religion and government, and the confusion of religion and state authority, by placing at the head of the civil liberties protected in the First Amendment a clause prohibiting an establishment and protecting free exercise of religion. Both provisions are thus designed to secure religious freedom by limiting governmental authority that would unduly diminish that precious freedom.

The Religion Clauses, then, should not be thought of as at odds with one another, one for freedom of religion and the other for disestablishment. The nonestablishment principle exists to safeguard the free exercise principle. Both together secure the civil liberty of religious freedom. In the words of the Williamsburg Charter, the two Religion Clauses are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty." *Id.* at 7. To quote the Charter again:

> "[T]he two clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment clause is the prohibition of state sponsorship of religion and at the

> heart of Free Exercise clause is the prohibition of state interference with religious liberty.
>
> No sponsorship means that the state must leave to the free citizenry the public expression of ultimate beliefs, religious or otherwise, providing only that no expression is excluded from, and none governmentally favored, in the continuing democratic discourse.
>
> No interference means the assurance of voluntary religious expression free from governmental intervention.... No sponsorship and no interference together mean fair opportunity. That is to say, all faiths are free to enter vigorously into public life and to exercise such influence as their followers and ideas engender. Such democratic exercise of influence is in the best tradition of American voluntarism and is not an unwarranted 'imposition' or 'establishment.'"

The Williamsburg Charter, at 16-17.

II. The Free Exercise Clause confers an immunity from sales and use tax on the church's proclamation of a religious message and on distribution of religious literature.

Amicus suggests that this approach to the relationship between the Religion Clauses can lead to a satisfactory result not only in this case, but in Religion Clause jurisprudence generally. Appellant is a church that uses a wide variety of means of communicating its religious beliefs to the general public, including radio and television broadcasting of religious messages, and occasional evangelistic rallies or "crusades." The court of appeal recognized that under *Murdock* and *Follett*, appellant is "entitled to 'as high a claim to constitutional protection as the more orthodox types' of spreading one's beliefs." J.S. App. A10-A11, citing *Murdock*, 319 U.S. at 110. The lower court, however, distinguished these precedents, confining their application to the particular form of tax at issue there, "a flat license tax which was unrelated to

receipts, income or administrative costs of a regulatory scheme." *Id.* at A11.

This constrained reading of *Murdock* and *Follett* is misguided for two reasons. It ignores the way in which the tax imposed here is functionally identical to the flat license tax repudiated in *Murdock* and *Follett*. And it overlooks the real point of the struggle for religious freedom that resulted in the rejection of the obnoxious historical practice of licensing the clergy: in our constitutional order the government is severely constrained in its authority to regulate or control the free exercise of religious ministry.

A. Imposing sales and use tax on the religious ministry of preaching and the distribution of religious literature is the functional equivalent of a flat license tax.

The ordinances involved in *Murdock* and *Follett* prohibited the practicing of various specified occupations without a license. They imposed a flat tax, one unrelated to the volume of business transacted. Although these ordinances were not written with the Jehovah's Witnesses in mind, they were applied "with an evil eye and an uneven hand," *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in a manner that clearly burdened the pamphleteering of that group. Once a religious minority using unorthodox means of communicating its message is regarded as a "menace" or a "nuisance," its foes will predictably use any weapon at their disposal to deal with the stranger.

The court of appeal was impressed with the difference between the occupational taxes invalidated in *Murdock* and *Follett*, and the sales tax at issue here. For several reasons, however, the similarities are greater than the differences.

First, the court below explained its decision to distinguish *Murdock* and *Follett* by noting that the sales and use tax is broad and facially nondiscriminatory. But, in fact, that is a similarity, not a difference, between this case and *Murdock*, where the occupational taxes were also argued to be acceptable precisely because of their

"wide, nondiscriminatory coverage." D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 196 (1962). Both taxes have only a superficial appearance of even-handedness and neutrality. On closer inspection, both the occupational license tax in *Murdock* and the sales and use tax imposed here are discriminatory in their application. In *Murdock* mainline Protestant, Catholic and Jewish clergy were not asked to pay an occupational license fee; the Witnesses were. Here the Archbishop of Los Angeles was not called in for an audit of all sales in the foyers of Catholic churches; an itinerant evangelist with no local political clout was. Thus the tax burden imposed upon the appellant here was applied with no greater neutrality than were the occupational license requirements in *Murdock* and *Follett*. See *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593, 4600 (1989) (O'Connor, J. dissenting).

Second, far from being a finely calibrated measure of actual sales, the process of determining the church's use tax liability was based on rough estimates of "what potential sales and donations might have been." J.A. 145, Tr. 153. Both the auditor for the church and the auditor for the state agreed that they could not determine with precision the amounts that were pure donations to the church (clearly exempt from taxation under state and federal law)[6] and the amounts deriving from "sales" of religious literature. Nor could the government get more heavily involved in determinations of this sort without a grave risk of excessive entanglement of the government with religion.[7]

Third, in its impact on the decision to conduct evangelistic crusades in the taxing state, the use tax is the

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6 This Court's recent ruling in *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593, 4600 (1989), does not rule to the contrary. It merely states that when one receives a precisely measured benefit in exchange for a contribution to a charitable organization, that contribution is not deductible from gross income for tax purposes.

7 See Part III, *infra*. See also Brief Amicus Curiae filed in this case by the Evangelical Council for Financial Accountability.

functional equivalent of the flat tax in *Murdock* and *Follett*. Because the amount of liability is not related to the size or frequency of these crusades, the imposition of use tax is like a flat penalty on clearly protected activity, the distribution of a religious message to willing hearers. As applied to the ministry of the appellant, the tax here is just like the occupational tax invalidated in *Murdock*, only bigger.

Although the Court in *Murdock* focused on the cumulative burden[8] of the particular form of taxation - a flat occupational license fee - on *itinerant evangelists*, that was by no means the sole measure of the harmful impact of the tax. A year later in *Follett*, the Court extended that rule to Witnesses involved in door-to-door evangelism in their own *home town*. The real point of those decisions was not the precise form of the tax at issue, but the impermissible impact of taxation on free exercise of religion.

B. The history of the struggle for religious freedom in this country supports the conclusion that the church is immune from sales and use tax imposed on its distribution of religious literature.

Once it becomes clear that the application of use tax to the distribution of religious literature by an out-of-state evangelist functions like the application of the flat occupational license tax invalidated in *Murdock*, then the reason why both applications are constitutionally impermissible likewise becomes clear. In our constitutional order, the government simply has no business regulating and controlling the clergy. That larger point is clear not only in the text of *Murdock* and *Follett*, but also in the history underlying the Free Exercise Clause.

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8 Once again, the similarity of the burden in *Murdock* and here is more significant than any difference, for the cumulative impact of compliance with use tax regulations for thousands of taxing jurisdictions is formidable. See, e.g., *National Bellas Hess, Inc. v. Dept. of Rev.*, 386 U.S. 753 (1967).

In assessing claims of unconstitutionality under the Religion Clauses of the First Amendment, this Court has urged that special care be given to the lessons of history underlying this provision.[9] For example, in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970), the Court sustained the practice of exempting the property of religious bodies used exclusively for public worship from the payment of state and local taxes. The appellee and several amici briefed the Court extensively on the history surrounding this practice, and both the opinion of the Court, 397 U.S. at 676, 678, and the concurring opinion of Justice Brennan, 397 U.S. at 680-689, relied extensively on that history. See also *Marsh v. Chambers*, 463 U.S. 783, 788-790 (1983). These cases do not teach that an historical pattern can justify a contemporary violation of a constitutional guarantee, but rather that courts can learn what to scrutinize in contemporary practices by understanding what concerned the framers when they proscribed an establishment of religion and protected its free exercise.

Here, of course, the state cannot point to a long-

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9 In this respect, it is helpful to recall that in the seventeenth and eighteenth centuries an "establishment of religion" was a codeword for deprivation of the civil liberties of virtually all who were not members of the officially sponsored state church. For example, in Elizabethan England Roman Catholics were forced to live five miles beyond the city gates. In the American colonies, the religious outsiders were deprived of the franchise and of eligibility to enter into a profession. Yet they were coerced to provide financial support for the ministers of a church to which they did not belong. See, e.g., T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986); W. McLoughlin, *New England Dissent: 1630-1833: The Baptists and the Separation of Church and State* (2 vols. 1971); C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 1-29 (1964). In short, nonmembers of the establishment were clearly second class citizens. For a helpful exploration of this theme and its implications for contemporary jurisprudence, see *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984) (O'Connor, J., concurring).

standing practice of imposing sales and use tax on the church for distribution of religious literature because that form of taxation is of relatively recent vintage, originating as a modest measure to afford relief to the unemployed in the depths of the Great Depression. Nearly[10] as soon as various local governments began to apply the occupational licensing ordinances to burden the free exercise of the Witnesses in the late 1930s and early 1940s, this Court set a constitutional limit to that abuse of the taxing authority in *Murdock* and *Follett*.

Like the *Walz* case, both *Murdock* and *Follett* were informed by the history of the struggle for religious freedom that led to the enactment of the First Amendment. Directly relevant to a correct resolution of this case is the history relating to the licensing of ministers. Ignoring the practical lessons of that history, the court of appeal sustained the imposition of a tax burden that in our culture is the functional equivalent of governmental licensing of the clergy, one of the very practices that the First Amendment was designed to avoid. Because the lower court ignored that history, amicus gives an account of it here.

One of the obnoxious practices indulged in by colonial governments had been the licensing and regulation of dissenting preachers and religious teachers.[11] In New

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10 After sustaining the application of these ordinances to the door-to-door canvassing of the Witnesses in *Jones v. Opelika I*, 316 U.S. 584 (1942), one term later this Court vacated that judgment in *Jones v. Opelika II*, 319 U.S. 103 (1943). See D. Manwaring, *Render Unto Caesar* 195-206 (1962).

11 The framers of the First Amendment were well aware of the threat to civil liberty posed by allowing the government to license the expression of opinion. Licensing had been the chief means of control and suppression of ideas deemed dangerous to the Crown from the statute of Henry VIII in 1530 down to 1697, when the Regulation of Printing Act was allowed to expire. Although the Star Chamber, which had enforced the early legislation, was abolished in 1641, the long Parliament (1640-1660) continued to harass and to censor printers by means of a licensing agency known as the Company of

England, for example, the Congregational establishment helped ironically to foment a spirit of rebellion through its intolerant rules regarding the licensing of ministers. For example, in his famous Memorial to the Massachusetts Assembly in 1775, the prominent Baptist preacher Isaac Backus wrote:

> "Our real grievances are that we, as well as our fathers, have from time to time been taxed on religious accounts where we were not represented.... Is not all America now appealing to Heaven against the injustice of being taxed where we are not represented, and against being judged by men who are interested in getting away our money? And will heaven approve of your doing the same thing to your fellow servants? No, surely. We have no desire of representing this government as the worst of any who have imposed religious taxes; we fully believe the contrary. Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship is not a mere favor from any man or men in the world but a right and property granted us from God, who commands us to *stand fast in it,* we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the abovesaid power, but also, according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God."

Memorial of the Warren Association, 2 *The Annals of America* 366 (1968). See also W. McLoughlin, *New England Dissent, supra* at 441-476.

In New York, the Church of England enjoyed a notably preferred position, and dissenting Baptists and

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Stationers, which had power to forbid the printing of any book, pamphlet, or paper which it deemed offensive. Although colonial newspapers were not generally required to be licensed, some of the earliest ones followed English precedent by submitting to censorship. The Free Press Clause was aimed at ending this practice of prior restraint. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

Presbyterians frequently chafed under the rule which required them to be licensed by the colonial government. An example of abrasive confrontation between church and state is found in the 1707 trial of Francis Makemie, a Scottish Presbyterian denied a license to preach in that colony. At his trial Makemie asserted that the colonial governor's attempt to regulate his freedom to preach and teach was "no law" to him. Defended by three Anglican lawyers, Makemie was acquitted on the charge of preaching without a license, and Trinitarian clergymen except for Roman Catholics were thereafter tolerated "so long as they went about their business peaceably." See, e.g., M. Kammen, *Colonial New York: A History* 157-158 (1975).

A similar preference for the Church of England, with similar problems for dissenting Protestants, obtained in the Southern colonies, including Virginia. See, e.g., H. Eckenrode, *Separation of Church and State in Virginia* (1910). In 1763, Patrick Henry gained prominence as a young lawyer by his spirited defense of three unlicensed Baptist preachers charged with the crime of disturbing the peace by, in Henry's phrase, "preaching the gospel of the Saviour to Adam's fallen race." In his *Life of Jefferson*, Parton notes that Henry's performance "was a triumph of the dramatic art. These men were discharged; but not the less in other counties did zealous bigots pursue and persecute the ministers of other denominations than their own. It was not till the Revolutionary War absorbed all minds, that Baptists ceased to be imprisoned." *Id.*, 204.

This history was still fresh in the mind of the founders of the republic. For example, the principal drafter of the First Amendment, James Madison, was impelled to a lifelong concern on behalf of religious freedom because of his experience of seeing unlicensed Baptist preachers locked up in the jail of Culpeper County. See W. Miller, *The First Liberty: Religion and the American Republic* 95-96 (1985). The unmistakable conclusion of this history is that intervention by the secular authority in the dissemination of a religious message was one of the very

specific evils against which the language of religious liberty was crafted, first in the Bills of Rights of the several states and then in the Free Exercise Clause of the First Amendment.

It would, of course, be an artificial and wooden reading of this history to confine its lessons to the precise form of governmental interference with preaching described above. That would be to assume that we are incapable of inventing new forms of inhibiting and burdening religious speech (such as the tax appellee seeks to impose on churches), and that it is not "a constitution that we are interpreting." *McCulloch v. Maryland*, 17 U.S. 316 (1819). Both of those predicates are erroneous. The history surrounding the adoption of the First Amendment stands for a much larger principle. That history clearly repudiates the imposition of sales and use tax collection liability on the churches for their distribution of their religious message to believers.

For these reasons, this Court should reaffirm that a tax imposed on the proclamation of a religious message by a church is impermissible under the Free Exercise Clause of the First Amendment.

III. Acknowledging the immunity of religious bodies from sales and use tax for the distribution of religious literature does not offend the Establishment Clause because it serves the legitimate secular purpose of avoiding excessively entangling contacts between government and religious bodies.

Appellant addresses the Establishment Clause issue at length in the opening brief, Br. for Appellant, at 35-45. To avoid duplicative briefing, amicus merely expresses here its general agreement with the views set forth in the Brief for the Appellant, and discusses this theme briefly to illustrate its view that what is protected under the free exercise principle should not be regarded as violating the nonestablishment principle.

If the two Religion Clauses are viewed as tugging in opposite directions, then the church could not be immune

from sales and use tax, even as applied to the core protected activity of proclaiming the gospel. When the clauses are viewed more harmoniously, however, the artificial tension between them is dissolved.

In the tension-filled interpretation of the Clauses the immunity from taxation described as supported by free exercise principles, Part II, *supra*, would inevitably run afoul of the Establishment Clause. It was just such a view that the Attorney General urged in *Thomas v. Review Bd. of the Indiana Employment Security Division*, 450 U.S. 707 (1981). Br. for Respondent, at 17-19 (any accommodation of religion under the free exercise principle is violative of the nonestablishment principle). This Court expressly rejected that extreme view of the relationship between the two Religion Clauses. 450 U.S. at 719-720.

Central to a correct resolution of this case and to a general theory of the Religion Clauses is the recognition that the nonentanglement principle requires the government to avoid needless or excessive intervention in the life of religious communities. Although this Court has included the nonentanglement principle as one of the criteria for adjudicating cases arising under the Establishment Clause,[12] some commentators have suggested that the protection of the autonomy and integrity of a religious body fits more properly within Free Exercise than within Establishment Clause jurisprudence.[13] Whether viewed as a free exercise problem or one arising under the nonestablishment principle, the direct and inevitable result of the decision below will be an unacceptable level of governmental intervention in the life of the church. For that reason alone, it should be reversed.

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12 See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

13 See, e.g., Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981); Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 Val. L. Rev. 285 (1984); Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. Rev.1195, 1210-1216 (1980).

This Court has repeatedly suggested that the mere potential of excessive entanglement of the government with religion suffices to invalidate a program. See, e.g., *Aguilar v. Felton,* 105 S.Ct. 3237 (1985). As the record in this case discloses, the intrusion of the audit process in the life of a church has already become an actual, not merely a potential threat to religious freedom.

The seriousness of this difficulty can easily be gauged by another example of appellee's unsympathetic behavior towards churches. In *ISKCON v. Bd. of Equalization*, Notice of Redetermination No. SR AS 18-649831, the California Board of Equalization recently assessed against a religious body over $43,000 in past due sales and use tax, interest and penalties, arising exclusively from the church's distribution of its sacred scriptures. When this determination was made, the church informed the Board that it could not pay the full amount of the assessment, and sought to negotiate a payment plan. The Board then conducted a probing post-audit analysis of the religious organization's financial records to ascertain its ability to pay the tax on the "sale" of sacred literature, which the church had challenged on the ground that this purported tax liability violated the rule announced in *Murdock* and *Follett.* The Board's auditor, for example, questioned expenditures allocated by the church's leadership for its annual religious festival, and urged the church officials to reduce that line in the church budget so that the church would be able to pay its contested tax bill sooner. During the process of these difficult negotiations, the Board recorded a tax lien encumbering all of the church's property used exclusively for religious purposes.

As in *Walz, supra,* opting for an immunity for churches from imposition of sales and use tax liability for the distribution of their sacred literature and their sacred music to their own adherents turns out to be the far less entangling alternative than taxing the churches in this way. Where, as here, the purpose and effect of an accommodation of religion is to avoid excessively entangling relationships between the government and religion,

that accommodation easily passes muster under the straightforward criteria developed in *Lemon, supra*. See, e.g., *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2868 (1987), see also at 2871 (Brennan, J. concurring); Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy* 81 Colum. L. Rev. 1373 (1981); and McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

In the light of these considerations on excessive entanglement, amicus offers three further comments on *Texas Monthly*. First, as was noted above, a majority of the Court viewed a particular exemption for religious literature as unwarranted because the benefit apparently flowed to religious groups only. That majority, however, includes two Justices who thought that the Free Exercise question presented here was still open.

Second, amicus suggests that the plurality is mistaken in assuming that there is "little danger of stomping out missionary work," *id.* at 904, if churches throughout the nation are put to the burden of this form of taxation on religious ministry. Everything that amicus knows about the mission of the churches in their outreach efforts supports the conclusion that this tax burden will severely chill protected religious activity.

Third, the plurality suggested that the sales tax burden falls on the buyer, and therefore creates no burden for the churches. 109 S.Ct. at 904. This view is mistaken as a matter of state law in many jurisdictions, where the primary obligation of the tax falls on the seller.[14] More importantly, this view overlooks the fact that even in those jurisdictions where the so-called primary obligation of the incidence of the tax falls on the buyer, the actual burden of the seller to calculate, collect and remit use tax is considerable.[15]

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14 See Table 3, Br. for Appelant, A-16 - A-22.

15 To support its contention that use tax collection liability would be excessively burdensome and entangling, appellant made the following offer of proof at trial: "The accounting involvement to collect, report,

The tax immunity proposed here corresponds closely to one of the principal historical reasons for the adoption of the Religion Clause, the movement to abolish the licensing of the clergy, and is therefore suggested by the Free Exercise Clause. Because that immunity avoids rather than entails governmental entanglement with religion, it passes muster under the Establishment Clause. This form of tax immunity - narrowly tailored to protected religious activity - does not constitute an establishment of religion. It is the best means of avoiding one.

Letting religion be free is not the same as establishing a religion. After all, religious freedom is not a gift from the government, but is - James Madison's term - a fundamental and inalienable right. As the Williamsburg Charter puts it:

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and file sales and use tax returns in all of these taxing jurisdictions throughout the United States would be an insurmountable burden for churches to bear in regard to the expense of distributing their religious message. The accounting and legal involvement required would be: (1) to determine the tax in each different location; (2) to keep track of all of the changes in that tax on at least a monthly basis; (3) to collect the different tax from individuals in each of those locations; (4) to report the different tax; (5) to secure and file returns in each of those locales; (6) to respond to audit inquiries in each of those locales; (7) to devise some method in many jurisdictions of advertising the price and the tax rate so that the individuals solicited for such donations or sales would know the amount of tax to send with their request so that the proper amount could be collected; (8) to develop a procedure to dub a different advertisement onto each tape for each different television station locale, which now exceeds 600 local television stations plus thousands of local cable outlets the dubbed advertisement would have to be flexible enough to state the varying tax rates for the varying locations to which [appellant] would be required to mail religious-content materials within the viewing area of that station or cable outlet); (9) to prepare receipts to each of these individuals to properly account for the proper rate of tax; (10) to establish and maintain an extensive library constantly to provide for each of the thousands of taxing jurisdictions within the United States in state, county, municipal, and other special taxing districts." J.A. 204-209.

> "Religious liberty depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of that right, especially toward the beliefs of its smallest minorities and least popular communities."

The Williamsburg Charter, at 9.

CONCLUSION

The conclusion that the decision below should be reversed is fully consistent with the view advanced here that the Religion Clauses should not be thought of as at odds with one another, one for freedom of religion and the other for disestablishment. Both the nonestablishment principle and the free exercise principle secure the civil liberty of religious freedom. Both principles require the decision below to be reversed. For these reasons, the judgment of the Court of Appeal of California should be reversed.

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 22, 1989, I served the within ***Brief Amicus Curiae of The Association for Public Justice in Support of Appellant*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Supreme Court, U.S.
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No. 88-1374 (5)

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

THE BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

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QUESTION PRESENTED

Whether, consistent with the Religious Clauses of the First Amendment, the State of California may impose a sales and/or use tax on the distribution of religious literature by a religious organization where: (1) the literature contains the fundamental teachings and beliefs of the religion; (2) the literature is distributed in furtherance of a basic tenet of the religion; (3) the literature is distributed for donations only; and (4) the funds received do not inure the benefit of any private individual, but are used exclusively for the organization's religious purpose.

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INTEREST OF THE AMICUS

This brief *amicus curiae* in support of the appellant is presented from the perspective of a minority religious movement, the International Society for Krishna Consciousness of California, Inc. (ISKCON), a not-for-profit religious corporation in Los Angeles, California. The brief is filed with the consent of the parties, as provided for by the Rules of Court.

ISKCON adheres to the principles of *Guadiya Vaishnavism*, or Krishna consciousness, which as a central tenet of its theology requires its followers to "[i]nstruct everyone to follow the orders of Lord Krishna as they are given in the *Bhagavad-gita* and *Srimad Bhagavatam* . . . and in this way try to liberate everyone in this land." A. Bhaktivedanta, *Sri Caitanya Caritamrta: The Pastimes of Lord Caitanya Mahaprabhu*, 3 Madhya-Lila 7:128 (1975).[1] In furtherance of this sacred command, Krishna devotees are "spiritually motivated to perform a religious ritual

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[1] The goal of the Hare Krishna movement may be said to be two-fold: First, one is to surrender himself completely to Krishna, who is recognized as the highest personality of Godhead. Through this devotion he will develop Krishna consciousness, which entails the deepening of one's love of God and man. . . . Secondly, one should endeavor to spread this knowledge of Krishna consciousness to all who are willing to learn it. Thus the Hare Krishna devotee lives an entirely sacralized life, in which all his waking hours are directed to no other purpose than to serve Krishna in these ways.

Judah, *The Hare Krishna Movement*, in Religious Movements in Contemporary America 465 (I. Zaretsky and M. Leone eds. 1974).

known as 'Sankirtan.' That ritual consists of the dissemination of religious tracts and small gifts to the public and the solicitation of funds to support the religion." *Jaffe v. Alexis*, 659 F.2d 1018, 1020 (9th Cir. 1981). *Sankirtan* "has three purposes: (1) to spread religious information which the Hare Krishna religion deems to be the truth; (2) to proselytize and attract new members; and (3) to generate funds to support the religious activities of the movement." *United States v. Silberman*, 464 F. Supp. 866, 870 (M.D. Fla. 1979).[2]

Because the performance of *sankirtan* "lies at the theological heart of [ISKCON's] religion" *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981), Krishna entities throughout the United States have consistently resisted governmental efforts to prohibit or impede their efforts to proselytize in a variety of public places, including airports,[3] state fairs,[4]

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[2] *See also Int'l Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869, 871 (E.D. Wis. 1978); *Int'l Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176, 178 (W.D. Mo. 1977); *Int'l Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 669 (W.D. Pa. 1977).

[3] *E.g., Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. Lou. 1978); *Int'l Soc'y for Krishna Consciousness v. New York Port Authority*, 425 F. Supp. 681 (S.D. N.Y. 1977); *Int'l Soc'y for Krishna Consciousness v. Wolke, supra; Int'l Soc'y for Krishna Consciousness v. Griffin, supra; Int'l Soc'y for Krishna Consciousness v. Engelhardt, supra; Int'l Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Texas 1977).

[4] *E.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Hynes v. Metro Gov't of Nashville and Davidson*

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stadia,[5] public buildings,[6] highway rest areas,[7] and public parks and sidewalks.[8] More than all of these challenges, however, is the threat posed to the free exercise of *amicus'* religion by application of the California sales and use tax to the distribution of religious literature.

Amicus does not sell its literature for a fixed price; nor is there a direct relationship between the cost to *amicus* of the book given and the donation received. Rather, a religious book is offered during *sankirtan* and any donation that is received is only incidental to the

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County, 667 F.2d 549 (6th Cir. 1982); *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981); *Edwards v. Maryland State Fair and Agricultural Soc'y, Inc.*, 628 F.2d 282 (4th Cir. 1980); *Int'l Soc'y for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979); *Int'l Soc'y for Krishna Consciousness v. State Fair of Texas*, 480 F. Supp. 67 (1979); *Int'l Soc'y for Krishna Consciousness v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977).

[5] *E.g., Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

[6] *E.g., United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979); *United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *Int'l Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Texas 1978).

[7] *Int'l Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

[8] *Int'l Soc'y for Krishna Consciousness v. Schmidt*, 523 F. Supp. 1303 (D.My. 1981); *Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116 (E.D. Cal. 1978); *Int'l Soc'y for Krishna Consciousness v. City of New York*, 484 F. Supp. 966 (S.D.N.Y. 1979); *Int'l Soc'y for Krishna Consciousness v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *Int'l Soc'y for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

book. Thus, one critic has observed that the aim of *sankirtan*

> is not primarily to make money (though devotees are very aware of the need to do so in order to cover the ever-increasing temple overheads), but to make the public aware of Krishna Consciousness and to 'plant Krishna in their hearts.' Even if people who buy Krishna Consciousness literature do not read it, devotees maintain that merely by association with Prabhupada's books and their Krishna content, they will be purified.

A. Burr, *I Am Not My Body: A Study of the International Hare Krishna Sect* 94 (1984).

Nonetheless, the California Board of Equalization has assessed ISKCON almost $300,000 in sales and use taxes for the period 1973-79.[9] The tax, which *amicus* paid under protest in 1980, was divided into two parts: (1) a *use* tax on religious books purchased from an out-of-state printer, which were then distributed gratuitously by *amicus* directly to the public; and (2) a *sales* tax on the transfer of religious books for a fixed sum by *amicus* to other Krishna consciousness temples within California, which in turn distributed the books gratuitously to the public.

Following payment of the tax, ISKCON filed an action for refund in Los Angeles County Superior Court, arguing that the law, as applied to the noncommercial distribution of religious literature, violated both the Free Exercise and Establishment Clause provisions of the United States and California Constitutions. After a trial

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[9] ISKCON was also assessed $43,922.98 in tax, interest and penalties for the last eight months of 1980. (Notice of Redetermination, No. SR AS 18-649831 Jan. 28, 1988). As discussed below, these substantial taxes have severely impaired the core religious practice of *sankirtan*.

on stipulated facts, the trial court denied *amicus'* claim for refund. *Int'l Soc'y for Krishna Consciousness v. Bd. of Equalization of the State of California,* No. C360177 (L.A., Cal. Super. Ct. Jan. 7, 1987). Accordingly, an appeal was taken to the Court of Appeal, *Int'l Soc'y for Krishna Consciousness v. Bd. of Equalization of the State of California,* No. B026332 (Cal. Ct. App., 2d Dist.), which has postponed its decision pending resolution of the present case.

For these reasons, ISKCON has a critical interest in the outcome of this case. If the California sales and use tax may be applied to the noncommercial distribution of religious literature, the principal means of proselytization for numerous religious organizations will be severely burdened. For fledgling religions such as Krishna consciousness, the tax may very well mean the difference between survival or failure.

SUMMARY OF ARGUMENT

The Free Exercise Clause of the First Amendment requires that the distribution of religious literature to the public be free of taxes, including the sales and use taxes imposed by California. The dissemination of scripture is speech, but the protection to be afforded it must be greater than that given other forms of speech because frequently it is *more* than speech. Many believers find in scripture power beyond its words, and in disseminating it, are worshipping God. Religion is given explicit protection in the First Amendment, beyond that given to speech generally. The Court has never approved a direct tax on the very act of religious worship, and has specifically stated that such taxes would violate the Free Exercise Clause. That the form of religious worship resembles

something protected by another constitutional provision should not diminish the protection afforded it by the Free Exercise Clause. Taxing religious literature, as does California, directly reduces the number of books that may be distributed, particularly when no fixed price is charged for the material. If a six percent sales tax is imposed, at least six percent less literature can be distributed because those relying on donations cannot increase the price by six percent. If the funds raised by public place proselytizing are the principal means of support of the religion, however, the impact will be far greater, because the funds raised must first pay fixed costs other than the purchase of books and pamphlets. If ten percent of a church's budget were available for the purchase of literature, a six-percent sales tax would reduce the amount of literature that could be distributed by more than half.

Typically, it is "new" or minority religions, such as ISKCON, that engage in widespread public dissemination of literature to spread the news of their existence and their message. Longer established churches rely on their larger number of members to attract new followers, or upon the religion of parents being followed by children. Typically, too, more familiar denominations have a broad base of financial support that makes it unnecessary for them to raise money from the general public. Therefore, the tax on the distribution of religious literature especially burdens fledgling, less familiar creeds, and brings the taxing power of the state to bear on behalf of existing churches.

To withstand a challenge under the Free Exercise Clause, a law must serve a compelling governmental interest. California did not and could not show that the loss of the minuscule fraction of its revenue derived from

taxing religious literature would have any discernable impact on its budget. Instead, it asserts that the Establishment Clause would be violated by exempting religion from a facially neutral sales and use tax law.

Tax simplification notwithstanding, exemption of a variety of individuals, enterprises, investments, and institutions from taxes at every level has long been and remains a feature of tax policy. When the exemption follows from the Free Exercise Clause, it not only serves a secular purpose, but one of the highest order. Precisely because religious exercise has explicit constitutional recognition, exceptions from facially neutral laws exist for unemployment insurance, compulsory school attendance, and labor-management relations. Not only does this special treatment of religion not offend the Establishment Clause, but it has been found, in many instances, to be required by the Free Exercise Clause.

While a tax exemption will, no doubt, aid religion indirectly, it does not involve the direct transfer of public funds to the church treasury. With the exception of the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 80 (1989), the Court has drawn a sharp distinction between laws that relieve religions of certain burdens and those that give religion direct support. A majority of the *Texas Monthly* court would not, however, find that a properly drafted exemption that included religious literature offended the Establishment Clause. At the very least, the imposition of taxes on religious worship raises the specter of substantial entanglement between state and church, an Establishment Clause violation of greater magnitude than that created by an exemption.

ARGUMENT

I.

AN EXEMPTION FROM THE CALIFORNIA SALES AND USE TAX FOR THE NONCOMMERCIAL DISTRIBUTION OF RELIGIOUS LITERATURE IS REQUIRED UNDER THE FREE EXERCISE CLAUSE.

A. The Free Exercise Clause Advances Core Constitutional Values Independent Of Those Protected By The Free Speech And Free Press Clauses Of The First Amendment.

For over 45 years, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *Jones v. City of Opelika*, 316 U.S. 584 (1942), *majority opinion vacated and dissenting opinions adopted per curiam*, 319 U.S. 103 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573 (1944), have helped to define religious liberty in the United States. In holding a flat license tax on the distribution of religious literature unconstitutional, *Murdock*, *Jones* and *Follett* are an essential component in a series of decisions by this Court upholding the rights of religious organizations to proselytize.[10] Writing for four dissenting justices in *Jones*, Justice Murphy was moved to observe the "arresting parallel . . . between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in the American Colonies for religious liberty which culminated in the Virginia Statute

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[10] *E.g.*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Tucker v. Texas*, 326 U.S. 517 (1946); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

for Religious Freedom, the Northwest Ordinance of 1787, and the First Amendment." 316 U.S. at 622.

Yet, "despite [this] most telling of personal experiences in religious persecution suffered by our forebears," *Abington School Dist. v. Schemmp*, 374 U.S. 203, 214, (1963), the instant case threatens to unravel that which has taken generations to create. In one of its most celebrated passages, *Murdock* emphasized that "the hand distribution of religious tracts . . . is more than preaching" or the "distribution of literature." 319 U.S. at 108-09. Rather, "[i]t is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.* at 109. Justice Murphy also stressed in *Jones* that "[i]mportant as free speech and free press are to a free government and a free citizenry, there is a right even more dear to many individuals – the right to worship their Maker according their needs and the dictates of their souls and to carry their message or their gospel to every living creature." 316 U.S. at 621 (Murphy, J., dissenting).

These decisions express a deep-rooted devotion to the principles of religious liberty and expression. Yet, the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 80 (1989), should it become the view of a majority of the Court, would effectively undermine this commitment by paring back those precedents. *Murdock* and *Follett* are not "unnecessarily sweeping" 109 S. Ct. at 903, when they suggest that "the States and the Federal Government may never tax the sale of religious . . . publications." *Id.* at 904. Nor does granting a tax exemption for religious expression violate the Establishment Clause. *Id.* at 899-900.

Murdock, Follett and *Jones* properly recognize that "religious liberty is one of the most fundamental and important values in American life." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee,* 80 Har. L. Rev. 1381, 1385 (1967). Indeed,

> religious liberty is the central concern of the constitutional order as it relates to the subject of religion. The purpose of the constitutional system – both in the restriction it imposes on the power of the government to interfere with the free exercise of religion and the limitation on the power of government to establish, aid, and support religion – is to protect and promote religious liberty in the widest sense of the term, including the individual's freedom to believe and to express his belief and the liberty of religious communities to bear witness to the truth they confess.

P. Kauper, *Religion and the Constitution* 13 (1964) [hereinafter Kauper].

Religious liberty, therefore, including that of religious expression, must be "recognized as an independent substantive liberty, having its own purpose, content, and dimension and existing apart from the other commonly recognized guarantees of free speech, free press, and freedom of assembly." *Id.* at 15. As further explained by Professor Kauper

> Religion deals with man's relationship with his God, however he may be defined. It is a highly personal matter and involves a man's loyalty to God as his highest good and the duties arising from this relationship. It defines an area of spiritual autonomy which is withdrawn from the reach of civil authority. It involves belief, and it conditions conscience and feeling. It presupposes freedom and voluntary adherence and cannot be coerced. Classical Christian thinking supports this view. Christian theologians recognize, first at all, a basic interior freedom of the

> Christian that can be described only in spiritual terms and which by its nature is incapable of limitation or circumscription by the state.

Id. at 22 (footnote omitted).

Because the spiritual commitment of many religious organizations, including that of *amicus*, "requires witnessing to the faith, the free expression of this faith in word and deed is essential." *Id.* at 22-23. This freedom, moreover, must include the unfettered right to seek converts through proselytization, to solicit for religious purposes, and to publish and distribute religious books and material. *Id.* at 34-35.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), therefore, the Court explicitly recognized the special status of claims arising under the Free Exercise Clause by pointing out that

> if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, *their claims would not rest on a religious basis*. Thoreau's choice was philosophical and personal rather than religious, and *such belief does not rise to the demands of the Religion Clauses*.

Id. at 216 (emphasis added).

The value of religious liberty is also embodied in the history of tax exemptions for religious institutions.[11] In

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[11] The granting of tax exemptions to religious organizations is probably as old as the institution of taxation. *See* Adler, *Historical Origin of the Exemption from Taxation of Charitable Institutions*. The exemption from taxation of churches, for example, "is based on a European tradition going back to the fourth century when the Emperor Constantine the Great, after

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the colonial period, for example, the rationale underlying the universal practice of exempting church property from taxation rested squarely on the concept of religious liberty:

> [I]f churches were to operate in a free market environment, a prerequisite was that churches have independence from governmental control, not just independence from governmental support. If churches were to draw upon their own resources and pursue their calling as they understood it, the government should not unduly impede those efforts. To have voluntaristic churches meant to be free of both government help and hindrance.

Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 360 (1984).[12]

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his conversion, gave the Church this privilege." A. Stokes and L. Pfeffer, *Church and State in the United States* 546 (1964). The exemption, moreover, was supported by the doctrine that church property "ceased to be under human control when it was devoted to God." Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411, 416 (1934). This same rationale is equally applicable to religious literature.

Moreover, while a tax exemption of "long standing" may not "shield [it] from the strictures of the Establishment Clause," *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 901 n.8 (1989) (plurality opinion), "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *McCollum v. Bd. of Education*, 333 U.S. 203, 256 (1948) (Reed. J., dissenting).

[12] This concept has both Free Exercise and Establishment Clause implications, and represents a *quid pro quo* between them in the area of tax exemptions for religion. Thus, "if the state is not to support the church, neither is the church to support the state." E. Smith, *Religious Liberty in the United*

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In light of these compelling underpinnings, this Court has consistently "interpreted the free exercise clause to provide a virtually unique protection for religion, one that is markedly greater than the security that the Constitution provides for speech." Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943 (1986) [hereinafter Choper]. An exemption from the California sales and use tax for the noncommercial distribution of religious literature is thus required unless the California State Board of Equalization (Board) demonstrates, at a minimum, that taxing this form of religious expression is the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). "It is basic that no showing merely of a rational relationship to a colorable state interest would suffice." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Rather, "only those interests of the highest order and not those otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

For the reasons discussed below, the California tax fails to satisfy this stringent standard.

B. Application Of The California Sales And Use Tax To The Dissemination Of Religious Books Creates A Direct and Substantial Burden On The Free and Voluntary Exercise Of Religion.

The formidable power of tax laws and policies to shape and inform the exercise of religious life is well documented. Federal tax laws, for example,

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States 295 (1972); *see* Freund, *Public Aid to Parochial Schools*, 82 Har. L. Rev. 1680, 1687 n. 16 (1969); *Walz v. Tax Comm'n*, 397 U.S. 664, 693 (1970) (Brennan, J., concurring).

> induce new religious movements to become formally organized at a very early date and thus may make them visible sooner than is true of similar groups in Europe. As a result, the primary regulators of our religious economy are state and federal tax collectors. This situation is reflected in the fact that founders and leaders appear to be the single highest risk group in terms of prosecution for tax violations. Unwittingly perhaps the IRS serves as a functional equivalent of the Holy Inquisition in the officially unregulated religious economy of the United States.

Stark, *How New Religions Succeed: A Theoretical Model*, in The Future of New Religious Movements 19 (D. Bromley and P. Hammond eds. 1987) [hereinafter *How New Religions Succeed*].

This power, moreover, is particularly delicate when applied to religion. "Because religious organizations need money (as well as donated time and services) for their activities, the scope of those activities will be influenced by governmental actions that have the effect of either taxing or subsidizing religion generally or particular religious organizations." McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 5 (1989) [hereinafter McConnell & Posner].

Thus, when the Jehovah's Witnesses pressed their right to proselytize and distribute religious literature principally in the 1930s and 1940s, it was not without reason that Chief Justice Stone stated in his dissenting opinion to *Jones* that "if the State may tax the privilege [of distributing religious literature] it may fix the rate of tax and, through the tax, control or suppress the activity which it taxes." 316 U.S. at 607. Nor was the Court in *Murdock* overreaching when it emphasized that "this method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute

which is exacted town by town, village by village." 319 U.S. at 115.

The Court's historic concern that some religious movements might collapse under the weight of government taxation rather than on the basis of the "zeal of [their] adherents, and the appeal of [their] dogma" *Zorach v. Clausen*, 348 U.S. 306, 313 (1952) is thus more than a "figure of speech." *McCollum v. Bd. of Education*, 333 U.S. 203, 247 (1948). To the contrary, this danger was so apparent to the majority in *Murdock* that it "did not believe it necessary to demonstrate that a tax actually had functioned repressively; it was sufficient to show that a First Amendment right was in fact being taxed in order to strike down the law." E. Smith, *Religious Liberty in the United States* 290 (1972).

This recognition is no less relevant today than it was 45, or, for that matter, 200 years ago. As noted above, Krishna consciousness requires its followers to perform *sankirtan*, in the context of which religious books are distributed and funds are received. However, there is no *quid pro quo* between the books distributed and the money received. Rather, such funds represent a voluntary donation by the contributor which can, and is, used for a variety of religious purposes, including support of the religion. Because of the voluntary manner in which *sankirtan* is performed, it is not possible to increase the amount of the donation, although an additional 6.5% "cost" is imposed by the California tax. The result of the tax is thus a significant decrease in the number of books distributed, as well as a painful reduction in the funds available to support the religion. Consequently, ISKCON is faced with two responses to imposition of the tax: (1) continue to perform *sankirtan* in the traditional manner;

or (2) radically alter the manner in which *sankirtan* is performed by "selling" religious literature for a fixed price.

Both of these alternatives are untenable. On the one hand, if ISKCON continues to perform *sankirtan* in a voluntary manner, it may not generate sufficient donations to pay the tax, not to speak of covering the cost of printing books or maintaining its temple and religious programs. On the other hand, if *Iskcon* "sells" its books for fixed price in order to ensure that it will generate enough funds to pay the tax, it will be radically modifying a sacred practice under governmental coercion.[13]

Moreover, in creating a direct and substantial burden on religious organizations that rely upon the grassroots distribution of religious literature for their survival, the tax simultaneously jeopardizes the core constitutional value of "pluralism of thought, a tonic necessary for a healthy, diverse society." *Barber*, 650 F.2d at 438; *see Walz*, 397 U.S. at (1970) (Brennan, J., concurring); *Schemmp*, 374 U.S. at 305 (1963) (Goldberg, J., concurring). Socio-culturally, it has been observed that minority religious movements such as ISKCON are more likely to succeed to

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[13] "[I]f a state seeks to impose property taxation on the property of a church, it follows that the state is claiming sovereignty over the church as an institution. This claim of sovereignty over the church has been rejected by Christianity for the last two thousand years" Comment, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 Drake L. Rev. 383, 392 (1985-86), and is firmly embodied in the concept of religious liberty. Consequently, "[s]ince 'the power to tax involves the power to destroy,' a claim by the government that it has inherent authority to levy a tax on the church is tantamount to a claim by the government that it has the latent power to destroy the church." *Id.* at 392.

the extent that they occur within a *"favorable ecology"* which is *"relatively unregulated."* *How New Religions Succeed, supra,* at 13 (emphasis in original). In this respect, religious competition is comparable to

> a market and the set of firms seeking to serve that market. And, as with commercial economies, a major consideration is the degree to which the market is regulated – that is, the extent to which it is a free market ruled by the forces of the marketplace, *or a market distorted toward monopoly by use of coercion by the state.* . . . [T]o the degree a religious economy is unregulated, pluralism will thrive – that the 'natural' state of religious economies is one in which a variety of firms successfully cater to the special religious interests of limited market segments.

Stark, *Church and Sect,* in The Sacred in a Secular Age 143 (P. Hammond ed. 1985) (emphasis added).

The First Amendment, therefore, can best "be understood as positing that the 'market' – the realm of private choice – will reach the 'best' results; or more accurately, that the government has no authority to alter such results." McConnell & Posner, *supra,* at 14. *Amicus* submits, however, that the California sales and use tax interferes with the delicate balance of religious pluralism by making it excessively costly for certain religious organizations to carry out their fundamental religious mission. Specifically, the tax impacts most severely on those religious organizations that rely upon the distribution of literature as their principal means of worship and proselytization, as well as upon new or minority religions that lack the financial resources[14] that mainstream, established religions may possess to absorb the cost of the tax.

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[14] *See* Johnson, *A Sociologist of Religion Looks at the Future of New Religious Movements,* in The Future of New Religions 258 (D. Bromley and P. Hammond eds. 1987).

The Free Exercise Clause, however, was meant to have the opposite effect.

> By taking into account the special costs that practitioners of minority faiths incur (minority faiths because laws generally reflect majority preferences – *e.g.*, for which day businesses shall be required to close), [the Free Exercise] cases reduce the cost of practicing such faiths and by doing so tend to increase the variety of faiths, which in turn enables more people to find a set of religious practices and beliefs they can share.

Id. at 55 (footnote omitted).

Thus, "if the state, through pecuniary or non-pecuniary exactions, makes it more costly to adhere to one creed than another (including the creed of nonbelief), this may cause a shift in religious affiliation." *Id.* at 5.

For this reason, church property, including religious literature,

> must remain tax free. To lay a tax on churches would enhance the power of the State; it would enable the State to control the churches and would certainly be contrary to the basic principle of church-state separation. The State that has ever-increasing need of financial resources might jeopardize the church's ability to operate as an effective agency. *Moreover, church taxation would enable only wealthy churches to subsist.*

Walther, *Tax Exemption and the Church*, 57 Liberty 10, 13 (1962) (emphasis added).[15]

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[15] "The disparity in income between large churches and small ones should not be forgotten here. A tax on large religious institutions would not be as detrimental to them as it would be to a small institution. If you take food away from a rich man and a poor man, the rich man will only be hungry, but the poor man may die." Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) Internal Revenue Code*, 17 Val. U.L. Rev. 405, 433 (1983).

Thus, in addition to placing a direct and substantial burden on religious expression, the California sales and use tax effectively reduces the variety of religious options available "in the competition of the [free] market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting).

C. The California State Board Of Equalization Has Failed To Articulate, Much Less Support, A Compelling Reason Sufficient To Override The Form Of Free Exercise Of Religion At Issue Here.

Aside from the basic offensiveness of a tax levied directly upon religious expression, other powerful reasons exist for holding the California sales and use tax an unconstitutional burden on the noncommercial distribution of religious literature. On the affirmative side, "the United States 'has long recognized the need to encourage, not handicap, those instrumentalities which foster and inculcate the principles of mercy, religion, and charity,' and which through their ethical teachings are a great asset 'in the field of public order.' " A. Stokes and L. Pfeffer, *Church and State in the United States* 547-48 (1964) (footnote omitted). Indeed, "[t]he influence of churches upon the character of various members of society is said to be sufficiently desirable to warrant the removal of church property from the tax roll. Religious societies devote their efforts and their property to the moral uplifting of society, in most cases seeking no pecuniary profit for themselves." Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411, 422 (1934). This rationale, moreover, has not been limited to real estate owned by churches, but extends equally to the income of religious organizations, *see, e.g.*, H.R. Rep. No.

1860, 75th Cong., 3d Sess. 19 (1939), as well as to sacred literature. *See* Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in The Wall Between Church and State 111-12 (D. Oaks ed. 1963).

Under these circumstances, few, if any, state interests are sufficiently compelling to justify the substantial infringement of religious liberty created by the California tax. Generally, the free exercise of religion may be restricted "only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 629 (1943). Indeed, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403; *accord Yoder*, 406 U.S. at 220.[16]

When such paramount interests are not at stake, however, the Court has required that religiously grounded exemptions be granted to otherwise neutral laws of general application. Thus, in *Sherbert* the Court

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[16] In this regard, overriding governmental interests have been found to exist in circumstances involving prohibitions against polygamy, *Reynolds v. United States*, 98 U.S. 145 (1878), and child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944); in the government's need for mandatory vaccinations against communicable diseases, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); in a uniform day of rest, *e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961); in the elimination of racial discrimination in education, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); and in the military's need for discipline and uniformity. *Goldman v. Weinberger*, 475 U.S. 503 (1986). The Court has also recognized important interests in the government's control of its internal administrative procedures, *Bowen v. Roy*, 476 U.S. 693 (1986) (opinion of three justices) and of its resources. *Lyng v. Northwest Cemetery Ass'n*, 108 S. Ct. 1319 (1988).

held the State's interest in preventing fraudulent unemployment claims insufficient to override a Seventh-day Adventist stricture prohibiting work on Saturday. Similarly, in *Yoder* the Court found the State's interest in compulsory universal education, "however highly we rank it" 406 U.S. at 214, insufficient to abridge a conviction of the Old Order Amish prohibiting public high school education for its young people. The Free Exercise Clause, therefore, "not only permits states to give exemptions to aid religion, but sometimes, as the Court's decisions in *Yoder* and *Sherbert* demonstrate, the rule requires states to give such exemptions." Choper, *supra*, at 947. Such is certainly the case with respect to a state *excise tax* imposed directly on religious literature.

This conclusion, moreover, is not undermined by *United States v. Lee*, 455 U.S. 252 (1982), which concerned the question of whether "imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance funds." *Id.* at 254. In upholding the constitutionality of the tax, the Court found compelling a governmental interest in the integrity of the "nationwide" social security system, *id.* at 258, which "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." *Id.* In other words, the interest in *Lee* was not the integrity of the tax system *per se*, but rather the threat to a system designed to aid the participants in one of the most vulnerable phases of their lives – old age.[17]

Here, in contrast, no such compelling interest exists. The tax in *Lee* was imposed on and for the benefit of

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[17] *See* McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 54 (1989).

individuals. The California tax, however, is imposed directly on the very act of religious worship. Also, the California tax is a state, as opposed to national, revenue raising device which lacks a specific overriding public welfare objective such as ameliorating the financial hardships of old age.

Moreover, the Board has not shown that the revenues generated by imposing a direct tax on the dissemination of religious literature is essential to its fiscal viability. In *Yoder*, for example, the State contended that its interest in its system of compulsory education was so compelling that even the established religious practices of the Amish had to give way. 406 U.S. at 221. The Court, however, refused to accept this unsupported assertion, and instead placed the burden of proof of the existence of such an interest squarely on the State:

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id.

Similarly, in *Sherbert* the Court emphasized that there was "no *proof* whatever to warrant [the State's] fears of malingering or deceit as those which the respondents now advance." 374 U.S. at 407 (emphasis added).[18] The

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[18] *See also Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) ("government must show that the opposing interest it asserts is of especial importance . . . [and] that the interest asserted will *in fact* be substantially harmed." [emphasis added]).

Court, therefore, may not simply accept without question the Board's theoretical assertion that it has a compelling interest in its excise tax system. Rather, assuming that the Board may impose a direct tax on religious literature – a proposition which *amicus* vigorously contests – the Board must be required to show, at a minimum, that the revenues generated by the tax are *critical* to its fiscal viability, which it has utterly failed to do.

D. The Board Has Also Failed To Demonstrate That Taxing The Dissemination Of Religious Literature Is The Least Restrictive Means Of Achieving Any Compelling Interest Found To Exist.

Along the same lines, the Board must also be required to show that the minimal diminution in revenues which would be created by exempting religious literatures from the tax could not be recovered from other sources. For example, the federal government imposes a tax, with certain exceptions, on charitable and religious organizations which derive income from "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function." 26 U.S.C.A. § 512(a) (West 1988). *Amicus* suggests that this is the proper standard for taxing religious organizations, as "a line between non-profit and the commercial activities of churches treats churches more neutrally than would other lines (for example, religious-nonreligious)." McConnell & Posner, *supra*, at 13.

However, the California tax makes no such distinction. On the contrary, the tax is callously imposed directly on an activity which *amicus* and many other religious organizations regard as sacred. Consequently, the distribution of religious literature is "not [a] proper source[ ]

of taxation for general revenue purposes. . . ." *Jones*, 316 U.S. at 620 (Murphy, J., dissenting). "[T]he State's interest [in] obtaining revenue, which [can] be satisfied by taxing any of a variety of sources, [does] not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as Sacramental." *McGowan v. Maryland*, 366 U.S. 420, 462-63 (1961) (separate opinion of Frankfurter, J., joined by Harland, J.). Rather, "the State's interest [in] obtaining revenue [must] be . . . satisfied by imposing this tax on nonreligious sources" *Braunfeld v. Brown*, 366 U.S. 599, 607 n.4 (1961), which will avoid the effect of "chok[ing] off ideas." *Jones*, 316 U.S. at 620 (Murphy, J., dissenting).

II.

AN EXEMPTION FROM STATE SALES AND USE TAXES REQUIRED BY THE FREE EXERCISE CLAUSE WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As *amicus* argues above, the day "for defining the ultimate scope of *Follett* and *Murdock*," *Texas Monthly*, 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment), is at hand. For the reasons already given, the Free Exercise Clause requires that religious groups that distribute religious literature for donations as an act of religious worship, be granted an exemption from state sales and use taxes. For the reasons discussed below, such an exemption would not offend the Establishment Clause, especially if it were stated broadly enough to encompass ultimate beliefs of the kind found to be sufficiently like religion to qualify an individual for classification as a conscientious objector to military service, *see Welsh v. United States*, 398 U.S. 333, 344 (1970); *United States v.*

Seeger, 380 U.S. 163, 166 (1965), or of the kind used to interpret religious exemptions from property taxes. *See Washington Ethical Soc'y v. Dist. of Columbia*, 249 F.2d 127 (D.C. Cir. 1957).

Until *Texas Monthly*, the Court had not struck down an exemption of churches or religious activities from taxation; nor had it approved a tax on such activities. On the contrary, the Court's principal pronouncements either invalidated taxes, as in *Murdock* and *Follett*,[19] or upheld tax exemptions, such as in *Walz*. If there was no formal agreement between church and state that churches would not look to government for financial support and government would, in turn, not seek financial support from churches, the virtually unbroken history of exempting churches from taxation bespeaks such an understanding.

Thus, the distinction between an exemption and a subsidy had long been clearly understood. Even if, according to some economic theories, they are functionally equivalent, the wisdom of the Bill of Rights makes clear that

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . .There is no genuine

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[19] *United States v. Lee*, 455 U.S. 252 (1982), a case discussed above, did not involve taxation of a religious institution, but rather merely the taxation of individuals. Moreover, the tax was imposed not on religious worship, but on employment unrelated to religious command. Similarly, in *Hernandez v. Commissioner*, 57 U.S.L.W. 4593 (U.S. June 5, 1989), the Court upheld an IRS disallowance of certain individual deductions from income, an action that did not tax a religious institution directly nor impose any tax on an act of worship.

nexus between tax exemption and establishment of religion.

Walz, 397 U.S. at 675. Indeed, the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' " *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), were first spelled out in those precise terms in *Walz*, which upheld an exemption of church property from taxes.

In *Texas Monthly*, the Court confronted extraordinarily difficult issues about the application of the Religion Clauses without the benefit of any religious group or individual as a party. The plurality first focused on the relatively narrow nature of the Texas tax exemption – its precise scope was not known, *see* 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment) – to distinguish it from the property tax exemption approved in *Walz*.

Such breadth has not, in other contexts, served to insulate the transfer of funds to religious institutions from the strictures of the Establishment Clause. Both the Rhode Island Salary Supplement Act and the Pennsylvania Nonpublic Elementary and Secondary Education Act, for example, aided all "nonpublic schools," religious and non-religious alike. *Lemon*, 403 U.S. at 607, 609. In any event, the majority in *Walz* specifically disclaimed any reliance on the breadth of the exemption. "We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others." 397 U.S. at 674.

Conversely, that the Free Exercise Clause frequently requires that some religions be granted exemptions from facially neutral laws has not led to the preference of the values inherent in the Establishment Clause over those

embodied in Free Exercise. On the contrary, it is the Free Exercise Clause that generally dominates, and such "dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." L. Tribe, *American Constitutional Law* 1201 (2d ed. 1988). A majority of *Texas Monthly* could not approve "subordinating the Free Exercise value," especially "at the expense of longstanding precedents." 109 S. Ct. at 906 (Blackmun, J., concurring in the judgment); *see id.* at 912 (Scalia, J., dissenting).

If a narrow exception necessarily violated the Establishment Clause, it would be difficult to explain such decisions as *Sherbert*, *Thomas v. Review Bd.*, and *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987), all of which gave special treatment to individuals whose religious beliefs precluded their performing work on Saturdays. Similarly, the Old Order Amish were treated with favoritism when their children were excused from compulsory school attendance in *Yoder*.

In weighing the impact of the Establishment Clause on a governmental action, the three factors articulated in *Lemon* are usually considered.

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, that statute must not foster 'an excessive government entanglement with religion.'

403 U.S. at 612-13 (citations omitted).

While the *Lemon* test is most clearly suited for use in evaluating legislative enactments, the constitutional concerns it embodies are relevent to the implications of

granting an exemption to sales and use taxes. Should the Court hold that the Free Exercise Clause mandates an exception to state sales and use taxes at least in certain circumstances, its reliance on the constitutional provision would unquestionably satisfy the "secular purpose" requirement. If actions *"arguably* compelled," *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (emphasis added), by the Free Exercise Clause do not violate the Establishment Clause, then those truly compelled must not. When the exemption follows from the Free Exercise Clause, it not only serves a secular purpose, but one of the highest order. For the same reason, the "effect" of a decision advancing interests protected by the Free Exercise Clause can only be described as secular, because it would be carrying out the interests of a civilly constituted government.

The third concern of *Lemon* – entanglement of church and state – would appear to be addressed better by granting a religious exemption than by withholding it. One of the reasons why subsidies are of a constitutionally different magnitude than tax exemptions is the "comprehensive, discriminating and continuing state surveillance," *Lemon*, 403 U.S. at 61, necessary to monitor the expenditure of state funds in a religious environment, compared to the effect of an exemption, which is to "restrict the fiscal relationship between church and state" and to "complement and reinforce the desired separation between them." *Walz*, 397 U.S. at 676. Thus, the imposition of taxes on religious worship raises the specter of substantial entanglement between state and church, an Establishment Clause violation of greater magnitude than that created by an exemption.

A majority of the *Texas Monthly* Court would not, therefore, find that a properly drafted exemption that included religious literature necessarily offends the Establishment Clause. A decision recognizing that at least some religious literature must be exempt from sales and use taxes should, in fact, be interpreted so as to afford the protection to religious (and analogous – *see Texas Monthly*, 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment)) organizations. In fact, a broadly drawn exemption would serve to avoid the entanglement of church and state that might well follow from scrutiny of each religion to determine the place literature distribution plays in its system of beliefs.

CONCLUSION

Therefore, and for all the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

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No. 88-1374

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OF CALIFORNIA,
Appellee.

On Appeal from the California Court of Appeal, Fourth Appellate District

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BRIEF OF *AMICUS CURIAE* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

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Interest of *Amicus Curiae*

Watchtower Bible and Tract Society of New York, Inc., (Watchtower) a not-for-profit religious corporation, is the parent organization of the more than 800,000 Jehovah's Witnesses in the forty-eight contiguous states, including over 132,000 Witnesses in California. Every one of Jehovah's Witnesses is an active door-to-door minister, preaching the good news of God's Kingdom to willing listeners and offer-

ing printed sermons in the form of religious tracts, pamphlets, magazines, books and Bibles for a suggested nominal contribution.

The court below and this Court in its recent decision in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), have discussed this Court's prior decisions relating to the preaching activities of Jehovah's Witnesses. Watchtower, as the parent organization of Jehovah's Witnesses, is uniquely familiar with these activities. And although Watchtower supports neither party in this case, Watchtower believes this Court should be informed of the Witnesses' door-to-door preaching work and how a tax on either the distribution or receipt of a printed religious message would bear on this work. For these reasons, Watchtower has filed this brief *amicus curiae*.

Argument

Jehovah's Witnesses follow the example of Jesus Christ and his disciples in preaching the good news of God's Kingdom from city to city and house to house. Jesus "went journeying from city to city and from village to village, preaching and declaring the good news of the kingdom of God." Luke 8:1. His followers in the first century used the same method: "Every day in the temple and from house to house they continued without letup teaching and declaring the good news about the Christ, Jesus." Acts 5:42. *See also* Luke 10:1; Acts 20:20.

So too, Jehovah's Witnesses today present the good news of Jehovah's Kingdom under Jesus Christ from door to door. The only difference between Jesus

and his followers and Jehovah's Witnesses today is that, in addition to their spoken message, the Witnesses present printed material conveying the same Kingdom message. There is no commercial or profit motive behind the Witnesses' requests for nominal contributions for this literature. Persons who show interest but are unable to make a contribution may be given the printed material anyway because the purpose of the work is to preach the good news, not turn a profit. *See* Matthew 24:14; 28:19, 20.

Justice Murphy's description of the preaching activities of one of Jehovah's Witnesses and her minor niece over forty-five years ago accurately portrays the nature of this work and the motivation behind it then and now.

> The record makes clear the basic fact that [the niece] was engaged in a genuine religious, rather than commercial, activity. She was a member of Jehovah's Witnesses and had been taught the tenets of that sect by her [aunt]. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of [her aunt], [the niece] . . . was standing on a public street corner and offering to distribute Jehovah's Witness literature to passersby. There was no expectation of pecuniary profit to herself or to [her aunt]. It is undisputed, furthermore, that she did this of her own desire and with [her aunt's] consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in "an age-old form of missionary evangelism" with a purpose "as evangelical as the revival meeting." Murdock v. Pennsylvania, 319 U.S. 105, 108, 109.

Prince v. Massachusetts, 321 U.S. 158, 171-72 (1944) (Murphy, J., dissenting).

The ongoing, house-to-house preaching activities of every one of Jehovah's Witnesses distinguish them from all other religious groups, including the Appellant. Indeed the activities of Appellant which have created its alleged tax liability are plainly different from the Witnesses' house-to-house preaching. Watchtower therefore takes no position and supports neither party on this appeal. However, since decisions of this Court from the 1940's considering the taxability of the Witnesses' methods of preaching and presenting religious literature from door to door appear to provide precedent that could influence or possibly even control the resolution of this appeal, Watchtower provides the following brief discussion of how a tax burden will affect the Witnesses' preaching work.

There can be no question that a tax imposed on either the presentation or receipt of a religious message is a burden on the act of either presenting or receiving that message. In the days of *Murdock v. Pennsylvania*[1] and *Follett v. Town of McCormick*,[2] Jehovah's Witnesses suggested a contribution of 5¢ per magazine and 25¢ per book from those interested in the message and willing to make a contribution. However, as stated above, magazines and books were often placed with interested persons who were unable to make a contribution. The same is true today. Jehovah's Witnesses suggest a contribution of 25¢ for

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[1] 319 U.S. 105 (1943).

[2] 321 U.S. 573 (1944).

the *Watchtower* or *Awake!* magazine, 30¢ for various pamphlets, and $1.00 to $3.00 for various books all on religious subjects. Again, literature is often given to interested persons who are unable to make a contribution.

The California tax at issue on this appeal, if construed to apply to ministers of Jehovah's Witnesses, would clearly impose a burden on their work. Assuming that each of the 132,000 door-to-door ministers of Jehovah's Witnesses in California is a "retailer" involved in the "business" of "sales" under the California tax code, each of them would be obligated to obtain a permit from the State of California for the privilege of "selling" tangible personal property "at retail" and would also be required to file quarterly tax returns on the contributions they receive for religious literature.[3] In addition, if the activities of Witness ministers are subject to taxation by the state, other taxing authorities (e.g., counties, municipalities) presumably could exact their taxes as well.

As might be expected, the occasional placement of magazines and pamphlets for contributions of 25¢ or 30¢, or of books for a dollar, does not generate much income, especially when one considers that each volunteer minister of Jehovah's Witnesses expends his own resources as far as time, gasoline, auto insurance and so forth when engaged in the ministry. Watchtower represents to this Court that the vast majority if not all of Jehovah's Witnesses

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[3] Cal. Rev. & Tax. Code §§ 6051, 6066, 6452 (West 1987).

operate at a loss if their activities are measured purely from a monetary standpoint. But this 'loss' is gladly and enthusiastically incurred because of the greater gain and satisfaction derived from being obedient to God's will and bringing a life-saving message to others.[4]

As has been stated many times, the only difference between a sermon presented in a religious tract or booklet and one delivered from a pulpit is the medium of presentation. Jehovah's Witnesses' use of religious literature in their preaching work is simply a method of reaching more persons with the Kingdom good news. A tract or booklet left with an interested person gives that person the opportunity to consult his own Bible and give more concentrated thought to the message.

The First Amendment assures freedom of speech, press and religious exercise. No one has yet proposed a tax (of whatever name or nature) on the traditional presentation or receipt of a religious ser-

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[4] Although the appellant in *Follett* "obtained his living from the money received; he had no other source of income," 321 U.S. at 574, Watchtower is unaware of any Witness minister who can do so today. The costs of distribution, including personal time and transportation, greatly exceed the small contributions received by the Witness minister. For example, the average Witness minister in California spends 9.9 hours a month in the ministry, leaving 6.1 magazines and 0.3 books with interested persons during the month. Even if one assumes that a contribution is received for each piece of literature placed, the average gross contribution from ministerial activities would be less than $1.85 per month for each Witness minister.

mon delivered orally from a pulpit even though those listening are encouraged to make a contribution in the collection plate. There is no principled distinction between a tax imposed on the deliverer or receiver of a printed sermon and a tax imposed on the deliverer or receiver of a spoken sermon. If the latter is abhorrent to First Amendment guarantees, on what principled basis can the former be countenanced?

Conclusion

Watchtower agrees with the court below —spreading the gospel "whether by 'age-old' methods or by new technologies, is protected by the Free Exercise Clause of the First Amendment." *Jimmy Swaggart Ministries v. Board of Equalization*, 204 Cal. App. 3d 1269, _____, 250 Cal. Rptr. 891, 897 (1988). However, Watchtower disagrees with the California court's abandonment of the following fundamental principle in *Murdock*:

> [T]he mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers and wholesalers of books. . . . [T]he problem of drawing the line between a purely commercial activity and a religious one will at times be difficult.

319 U.S. at 111.

Despite the occasional difficulties in distinguishing commercial from religious activities, the distinction exists and must be observed. Where the activity is religious, such as that of ministers of Jehovah's

Witnesses, the burdens imposed on retail merchants (to register, file quarterly returns, collect and pay license or sales or use or whatever taxes) should not encumber the right to freely deliver or receive a sermon, printed or otherwise.

Respectfully submitted,

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No. 88-1374

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE JIMMY SWAGGART MINISTRIES,
Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal, State of California Fourth Appellate District, Division One

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BRIEF AMICUS CURIAE OF THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FOCUS ON THE FAMILY, INSIGHT FOR LIVING, THE MASTER'S COMMUNICATION, AND PRISON FELLOWSHIP, AS AMICI CURIAE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Whether the imposition of the burden of collecting and remitting use tax on national religious ministries excessively entangles the government in the internal affairs of religious bodies?

II. Whether the imposition of the burden of collecting and remitting use tax on national religous ministries has a chilling effect on the protected activity of disseminating religious messages to those willing to hear them?

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BRIEF AMICUS CURIAE OF THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FOCUS ON THE FAMILY, INSIGHT FOR LIVING, THE MASTER'S COMMUNICATION, AND PRISON FELLOWSHIP, AS AMICI CURIAE IN SUPPORT OF APPELLANT

STATEMENTS OF INTEREST

Amici are national evangelical ministries that in many important respects are quite diverse and distinct from one another. They do, however, share two things in common: (1) a common goal of spreading the *Gospel* of Jesus Christ to all who wish to hear it, and (2) a commitment of *going from state to state* to proclaim that

Gospel. Thus amici are aptly described as *itinerant evangelists.* They frequently travel from state to state for the purpose of conducting evangelistic meetings, religious seminars and pastoral conferences.

For the very reason that most of the amici filing this brief are typically "out-of-state," they have little, if any, influence over the political processes that determine the imposition of tax burdens by state and local governments, and must rely on the protection of the First Amendment to secure their vulnerable religious freedoms. For the same reason, the multi-state character of amici gives them a special interest in the decision of the California Court of Appel to empower the thousands of taxing authorities in America to impose the burden of collection and remission of sales and use tax on ministries for engaging in the distribution of religious literature and sacred music.

The Evangelical Council for Financial Accountability (ECFA) was founded in 1979 as an association of evangelical, non-profit organizations requiring high standards of financial accountability and disclosure to donors, government and other interested persons. ECFA certifies over 560 Christian ministries for financial accountability. The interests of ECFA in this case are three-fold. First, most of the ministries certified by ECFA serve constituents in states other than where their principal office is located. To require an "out-of-state" ministry to serve as a sales and use tax collector on religious literature mailed into the taxing state because the ministry has held a religious conference, crusade, seminar or other religious meeting in the taxing state will have a chilling effect on the free exercise of religion for these ministries. Many ministries will be forced to decide whether it is worth conducting a religious meeting in the taxing state if the result will be for the ministry to submit in perpetuity to the administrative nightmare of complying with hundreds of separate sales and use tax jurisdictions within the taxing state. Second, the decision below invites sig-

nificant entanglement of taxing authorities with religious organizations in determining whether funds received were, in fact, monies on a "sale" or a "donation." ECFA members have multiple variations in the way they receive funds and distribute religious literature and other teaching materials. Frequently, materials are sent out by a ministry to donors solely as a gift from the ministry rather than as a sale or a *quid pro quo* "premium" for a gift sent to the ministry. The responsibility for determining whether each transaction is a "donation" or "sale" will place a significant burden on the ministry's ability to distribute religious materials to its constituents. Third, ECFA is concerned that the type of taxes at issue in this case will be selectively enforced more frequently against highly visible or unpopular ministries than on large and popular denominations. Undoubtedly, states will overlook tax enforcement that is not economically or politically feasible.

Focus on the Family (FOF) is a California corporation, organized under the Religious Non-Profit Corporations Law of the State of California. Its principal office is located in Pomona, California. FOF also maintains an office in Washington, D.C., but has no other branch offices. It does not maintain a staff or conduct business in states other than California. The articles of incorporation of FOF provide that it has been organized "for the express purpose of spreading and propagating the Gospel of Jesus Christ." To effectuate that purpose it maintains a daily radio broadcast that is heard in all 50 states. As an integral component of this purpose, FOF distributes by mail book, audio and video tapes, pamphlets, magazines and various other religious educational materials designed to complement and enhance the religious purposes of the corporation. FOF presently gives away the materials that it distributes to its constituents for the purpose of providing help to families seeking guidance in child-rearing, marital relations, and financial respon-

sibility. If it were to begin to sell these materials, the application of the decision below to FOF would impose a significant administrative burden, necessitating the reprogramming of a very costly and extensive computer system, the creation of an entire new accounting and reporting department, with a substantially increased number of employees and an attendant increase in operating costs. It is entirely foreseeable that the application of the decision below to FOF would result in a substantial reduction in its charitable/religious activities, specifically in the distribution of resource materials intended to benefit the families of its constituents. This reduction in distribution of religious literature would be attendant upon the recordkeeping and reporting system envisoned under the rule devised by the court below.

Insight for Living (IFL), founded in 1978 is a California non-profit religious corporation with its principal offices in Fullerton, California. IFL is a ministry that teaches the Bible, as the inspired Word of God, by means of an internationally broadcast radio program and printed Bible study materials, using primarily sermons and literature of Dr. Charles R. Swindoll. The ministry also provides biblically based personal counselling by mail. Its radio programs air over 700 stations each day. The interest of IFL in this case flows from the fact that IFL has a ministry to people in all 50 states. It would very likely be forced to restrict and even withdraw from conducting ministry activities in all but the most populous states if the decision below were affirmed. The potential administrative burden placed on IFL would be incalculable. IFL could not afford to comply with the sales and use tax laws of every state where it has constituents.

The Master's Communication (TMC), founded in 1978, is a California non-profit religious corporation with its principal offices located in North Hollywood, California. Its ministry uses mass communications media, including

radio, to expand the teaching ministry of Dr. John F. MacArthur, Jr. TMC has constituents in all 50 states with a daily radio program aired on over 360 stations. The ministry has over 21,000 constituents in at least 16 states where it has never held any conference, crusade, seminar, lecture or other religious meeting in connection with its ministry. If this Court were to affirm the judgment below, the costly administrative burden imposed by the obligation of serving as a tax collector would force on TMC the difficult decision of having to forego expansion of its ministry into states where it currently has limited contacts.

Prison Fellowship (PF) is a national non-profit organization founded in 1976 by Charles W. Colson. Its purpose is to assist local Christian churches in ministering to prisoners, ex-prisoners and their families, and to work for a just and effective criminal justice system. PF seeks to encourage and to mobilize Christians to help restore transcendent, biblically based values in our society, as part of a permanent solution to the problem of crime. PF is active in over 550 state and federal prisons, working through its volunteers and employees with more than 75,000 prison inmates and family members each year. As a crucial component of its efforts to encourage and mobilize Christians to restore ex-offenders to society, PF annually distributes over 150,000 pieces of literature in all 50 states. Some of this literature is sold, while some is given away to individuals who provide financial support. Affirming the judgment below would be a sudden elimination of a long established practice of exempting the distribution of religious literature from sales and use tax. This result would place a substantial administrative burden on PF by increasing dramatically the number of jurisdictions for which it would have to collect sales and use tax for the distribution of literature directly related to its religious educational ministry. This administrative burden would require PF to divert re-

sources away from direct ministry to prisoners. The net effect would be to discourage the distribution of religious literature by PF as a means of furthering its religious tenets that Christians are to be "salt and light" in American culture.

Pursuant to Rule 36.2 of this Court, amici have obtained the consent of counsel to the parties to file this brief. The originals of the consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The court of appeal imposed on a national religious ministry the burden of collecting and remitting use tax for engaging in a core religious activity, the distribution of religious literature. If this judgment is affirmed, the door will be wide open for over 7,000 taxing jurisdictions to impose a similar burden on national religious ministries throughout the country.

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court held that states and local governments could no more impose a license tax on itinerant evangelists distributing religious literature than it could require a local preacher to register with the government and obtain a license to preach. As Justice Douglas stated in *Murdock*:

> "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be

> crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped."

Id. at 114-115.

A year later in *Follett v. McCormick*, 321 U.S. 573 (1944), the Court extended the same principle of constitutionally mandated tax immunity to preachers going door to door distributing religious literature in their own home towns. Justice Reed, who had written the opinion of the Court in *Jones v. Opelika*, 316 U.S. 584 (1942), and who had dissented in *Murdock*, 319 U.S. at 117-134, switched his vote in *Follett* and accepted the conclusion that "distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment." *Follett, supra*, 321 U.S. at 578 (Reed, J., concurring).

Relying on *Murdock*, *Follett*, and an Opinion of the California Attorney General, No. 79-524, J.A. 14-15, squarely based on these decisions, appellant in this case has challenged on First Amendment religion clause grounds (a) the application of sales tax to its distribution of Bibles, sermons and sacred music to its own religious adherents at evangelistic crusades held occasionally in California, and (b) the application of use tax to its distribution by mail of the same sorts of religious literature to adherents in California from its headquarters to Louisiana.

The plurality opinion announcing the judgment of the Court in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 980 (1989), cast doubt on the continuing vitality of *Murdock* and *Follett*. *Id.* at 903. The plurality fairly invited this brief and those submitted by other religious organizations such as the Watchtower Bible and

Tract Society (the original free exercise claimants in *Murdock* and *Follett*) and the National Council of Churches of Christ in the United States (the largest ecumenical coalition of Protestant and Orthodox Christian bodies). For although no religious organization was a party, an intervenor, or an amicus in *Texas Monthly*, the plurality opinion nonetheless concluded on the spare record in that case that the imposition of the burden of sales and use tax liability directly on the distribution of religious literature by religious organizations to their members would not "inhibit religious activity." *Id.* at 901.

Amici urge this Court to reconsider that conclusion in the light of the actual experience of religious ministries that are national in scope. This brief offers two reasons why the court of appeal in this case should be reversed and the views advanced by the plurality in *Texas Monthly* should not be followed. First, the imposition of the burden of collecting and remitting use tax on national religious ministries for the distribution of religious literature will excessively entangle the government in the internal affairs of religious bodies. Second, the imposition of the burden of collecting and remitting use tax on national religious ministries for the distribution of religious literature will have a chilling effect on the protected activity of disseminating religious messages to those willing to hear them.

ARGUMENT

I. The Imposition Of The Burden Of Collecting And Remitting Use Tax On National Religious Ministries Will Excessively Entangle The Government In The Internal Affairs Of Religious Bodies.

In *Watson v. Jones*, 80 U.S. (13 Wall.) 697 (1871), this Court first announced the principle of nonentanglement by the government in ecclesiastical matters. In *Watson*, Justice Miller stated: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority." *Id.* at 730. In short, the *Watson* principle means that there must be mutuality of freedom for both church and state.[1] Unlike *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), however, this case presents no plausible issue of improper intermeddling by the church,[2] in the realm of the government. On the contrary, as applied to the question presented in this case, the *Watson* rule suggests that it is constitutionally impermissible to impose the burden of sales and use tax directly on the core protected activity of distributing religious literature to religious adherents.

As amici note below, the imposition of this burden will inevitably engage the government in determinations of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them," as well as in determinations of "the usages and customs, the written laws and fundamental organization of every re-

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[1] It should, however, be noted that the text of the First Amendment sets limits on governmental authority: "Congress shall make no law . . ." U.S. Const. Am. I. See also U.S. Const. Am. XIV: "No State shall deprive any person of . . . liberty . . . without due process of law."

[2] The term "church" in this brief is not restricted to any religious body, but includes all such bodies.

ligious denomination." *Id.* at 733. Under *Watson*, these sorts of inquiries are prohibited to federal and state judges, who take an oath to uphold the Constitution: "courts must be incompetent judges of matters of faith, discipline, and doctrine." *Id.* at 732. *See also Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981). Whether deeply probing or merely clumsy, such inquiries about religious practices should be no less prohibited when indulged in by state tax collectors and auditors, who are neither trained nor bound by oath to respect the fragile civil liberties of taxpayers.

The *Watson* principle of nonentanglement, now acknowledged as constitutional in stature,[3] has been reinforced in subsequent decisions of this Court dealing with the limited authority of secular courts to probe into the affairs of religious bodies. For example, in his separate concurring opinion in *Maryland & Virginia Eldership v. Church of God at Sharpsburg*, 397 U.S. 367 (1970), Justice Brennan warned of the particular danger of probing "into the allocation of power within a church so as to decide where religious law placed control over the use of church property". *Id.* at 369 (Brennan, J., concurring) (1970). In *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970), Justice Brennan also warned of general danger of extensive inquiry into the financial structures of a religious body. *Id.* at 691 (Brennan, J., concurring). Similarly, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), Justice

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[3] *Watson* was a diversity case decided before the religion clauses were deemed to be incorporated against the States through the due process clause of the Fourteenth Amendment. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), this Court clarified that the principles announced in *Watson* are now binding on the States as a matter of constitutional law, not as a matter of "federal common law."

Brennan noted that the First Amendment prohibits courts from probing deeply into matters of church polity and organization. *Id.* at 698, 713, 721.

Those warnings are still timely and are highly relevant to the resolution of this case, for unless the court of appeal is reversed, the administrators and auditors of the more than 7,000 taxing jurisdictions in this country will have been given a free hand: (1) to characterize the spiritual "usages and customs" of religious bodies as commercial transactions in violation of *Watson*, (2) to conduct tax audits probing "into the allocation of power within a church" in violation of *Maryland & Virginia Eldership*, (3) to inquire extensively into the financial structures of a religious body in violation of *Walz*, and (4) to probe deeply into matters of church polity and organization in violation of *Milivojevich*.

Another line of cases, dealing with state aid to church-operated schools, has also developed the principle of non-entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 614-622 (1971); *Aguilar v. Felton*, 473 U.S. 402 (1985). By its very terms, the standard of "excessive entanglement" admits of degrees. Some contacts between church and state are unavoidable. *Lemon, supra*, 403 U.S. at 614. When these contacts are permissible, it is not so much because they happen infrequently, as that when they do occur they are not very intrusive into the religious ministry of the church. *Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 305 (1985).

The principle of avoiding excessive governmental entanglement with religious bodies, moreover, has been extended to cases setting limits on the regulatory authority of the government over religious bodies. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Corp. of Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2871 (1987). Indeed, this Court expressly acknowledged that the statutory exemption sustained in *Amos* had the legitimate purpose and effect of eliminating the need for entangling

case-by-case inquiries by governmental officials into the scope of a church's religious mission. *Id.* at 2868, 2870; see also at 2871 (Brennan, J., concurring, citing Laycock, *Toward a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981)).

A leading case developing the theme of nonentanglement, a case directly on point to the present case, is *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970). In *Walz* the Court voiced hypothetical concerns about potential danger to religious freedom if a regimen of taxation of religious bodies were given full scope. "Elimination of [tax] exemption would tend to expand the involvement of government [with churches] by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674. The record in this case discloses that the potential danger feared in *Walz* has now become actual or threatened injury. Appellee's auditors engaged in the very sort of intrusive monitoring and surveillance that the *Walz* court deemed a paradigm of "excessive entanglement." As in *Walz*, a schema of exemption for religion turns out to be the best way of keeping the government from intruding too deeply into spiritual matters beyond its ken. *Id.* at 674.

The court of appeal got the constitutional principle of nonentanglement wrong by making it look simple. The lower court apparently accepted the contention of the appellee that the distinction between taxable sales and exempt contributions is an easy one for an outsider to draw. In religious matters, however, "things are seldom what they seem." For example, employment practices that are grounded in deeply religious concerns may seem "purely secular" to an outsider and therefore readily amenable to governmental regulation. This misperception of religious reality by an outsider did not inhibit

this Court from recognizing the need to accommodate the religious perspective of a religious employer with respect to the hiring and termination of its own employees. *Amos, supra.*

The likelihood that state tax officials will be sensitive to the free speech and free exercise concerns of non-profit organizations they face in an adversarial administrative setting is slim. To the contrary, the probability that religious organizations will become the target of persons insensitive, if not hostile, to their religious perspective is high. A major difficulty is lurking in the use of commercial images to analyze religious beliefs and practices. In any event it is risky to allow the government to draw fine lines in this area.

Some lines are easier than others to draw. It may not be easy in all instances to draw a bright line between exempt income and unrelated business income. See, e.g., J. Galloway, *The Unrelated Business Income Tax* (1982). Nevertheless, amici acknowledge that federal tax officials are authorized to engage in this form of line-drawing, even where the income of a church is at issue. Indeed, as the amicus brief for the National Council of Churches filed in this case notes, two major religious organizations —the National Council of Churches and the United States Catholic Conference—testified before the House Ways and Means Committee in 1969 that as a matter of sound social policy churches should not be exempt from federal taxation on income derived from business unrelated to their exempt religious purposes. Analogously, amici concede that if a church engages in plainly commercial transactions, they may subject themselves to that limited extent to sales and use tax liability on income derived from such sales.[4]

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[4] Appellant did not seek a refund for the tax on the sales of various objects such as T-shirts and mugs that it did not regard as having "specific religious-message content." J.S. App. A3-A4

Other kinds of line-drawing, such as that attempted by the appellee here, involve the danger of governmental intrusion into the spiritual convictions of religious bodies, and should be prohibited on that ground alone. For example, much more difficult than the distinction between related and unrelated income is the attempt to measure what is meant by something of spiritual value received from the church. Appellee must surely concede that it may not tax the preaching of a sermon or the hearing of it, even if a collection plate is passed at the service in which the sermon is delivered. The income of a church derived from pure contributions to the church is beyond the reach of the tax collector, whether as a constitutional principle or as a matter of state public policy. See, e.g., Calif. Rev. & Tax Code § 23701d.

Exempt gifts do not become taxable by giving them another label, or by falsely mischaracterizing the spiritual nature of the "transaction" in which the religious adherent receives something of spiritual value from the church. As this record illustrates, moreover, it was impossible for the accountants and auditors who poured over appellant's records to differentiate carefully between contributions and income derived from the "sale" of religious literature. J.A. 165-169, Tr. 169-171. Indeed, appellee's demand for tax payment was concededly based on a rough estimate of tax liabiilty, one that seems plainly overstated in light of the dubious criteria employed to arrive at a final figure. J.A. 148-152, 165-169, Tr. 153-157, 169-171.

Once the genie of allowing the government to define the meaning of "spiritual value" is out of the bottle, it will be impossible to stuff the genie back into bottle without severe damage to religious freedom arising from the government's delving into religious beliefs. The "value" placed upon the Scriptures and views of the

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n.3. The issue squarely before the Court in this appeal is the permissibility of taxation of the distribution of religious literature.

afterlife related to the "sale" of indulgences were at the heart of the theological controversies that tore Western Christianity apart during the Reformation of the church in the sixteenth century. The bitter divisions among Christians in the aftermath of the Reformation generated "turmoil, civil strife, and persecution" that were very much in mind at the time of the framing of the First Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

Whatever one's views of these religious controversies, the American approach to them is that they are not susceptible of resolution by the government. This Court has made clear on several occasions that "it is not within the judicial function and judicial competence to inquire [about perceptions] of the commands of faith." *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981); see also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *United States v. Ballard*, 322 U.S. 78 (1944).

To allow states to redefine the distribution of religious literature by a church to its own believers as a purely commercial transaction is to invite the inevitable and impermissible risk that the administrators of the more than 7,000 taxing jurisdictions in this country will be set loose to rummage around among sincerely held religious beliefs and practices, in search of activities that they might characterize as a "sale." If "courts are not arbiters of scriptural interpretation," *Thomas*, *supra*, 450 U.S. at 716, tax collectors have no greater ability or warrant to attempt to discern these matters. For this reason alone, this Court should not countenance any expansion of taxing authority into an area rife with danger for religious freedom, let alone the exponential expansion of governmental supervision and surveillance of churches implicated by the decision below.

When the taxman cometh, he generally does so for the obvious purpose of discovering whether there are

means of enhancing governmental revenues. Recognizing that federal tax officials may lack sensitivity in dealing with taxpayers, Congress recently enacted the Omnibus Taxpayers' Bill of Rights. P.L. No. 100-647, 100 Stat. 3342 (1988). Recognizing further that the free exercise of religion may not survive hostile or aggressive auditing of religious bodies, Congress has also set statutory limits on the power of the IRS to conduct tax investigations of these organizations. Church Audit Procedure Act, 26 U.S.C. § 7611; see also § 7605(c) and S. Rept. No. 91-552, 91st Cong., 1st Sess., 1969-3 C.B. 423, 468, and Int. Rev. Regs. § 301.7605-1(c)(1). There is no such legislation in California to inform, guide or structure the discretion of the appellee. Amici are aware of no state legislation parallel to the federal Church Audit Procedure Act. Indeed, the record in this case discloses that the appellee threatened criminal sanctions unless the appellant registered with the state as its agent for tax collection purposes. When the Board of Equalization had completed its extensive audit of the financial records of the appellant church, one Lamb wrote as follows on behalf of appellee to counsel for the church: "We must have an immediate response sending the completed applications registering your organization for its past and future sales activities in this state. *Any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor.*" (J.S. App. E1-E2).

All states that impose sales and use tax attach criminal penalties to failure to comply with the complicated statutes and regulations relating to them. Most of the states make some dimension of noncompliance a felony.[5] Amici do not contend that they have a constitutional right to be exempt from every form of taxation. In the normal course of events in a sane society, sound prosecutorial discretion may be relied upon to avert the threat of applying

[5] See Table 2, column 2 in Appendix A to Appellant's Brief.

these criminal penalties to religious bodies, at least when they are making plausible claims of exemption, whether provided by statute or, as appellant and amici maintain here, required by the Constitution. If, however, the aggressive posture of the appellee is a preview of what churches can expect in the future from unbridled tax collectors, amici can only urge this Court to join them in "alarm at the first experiment on our liberties." J. Madison, *Memorial and Remonstrance* as cited in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Appendix to opinion of Rutledge, J., dissenting).

II. The Imposition Of The Burden Of Collecting And Remitting Use Tax On National Religious Ministries Will Have A Chilling Effect On The Protected Activity Of Disseminating Religious Messages To Those Willing To Hear Them.

Very recently, the plurality opinion in *Texas Monthly* suggested that the imposition of sales tax collection responsibility on religious communities would not "inhibit religious activity." 109 S. Ct. at 901. Amici respectfully disagree with this suggestion, adopted by three of the Justices in *Texas Monthly*, where the record was not fully developed on the impact on religious freedom, perhaps because no religious organization was a party, an intervenor, or an amicus in that case.

As the statement of interests suggests, *supra*, at 1, amici are aptly described as *itinerant evangelists*. They frequently travel from state to state for the purpose of conducting evangelistic meetings, religious seminars, and pastoral conferences. For that reason the typically multi-state character of most of the amici puts them in a unique position to inform this Court of the substantial burden that an affirmance of the decision below would have on their ministries.

The court of appeal imposed on a national religious ministry the burden of collecting and remitting use tax

for engaging in a core religious activity, the distribution of religious literature. If this judgment is affirmed, the door will be wide open for taxing jurisdictions all over the country to impose a similar burden on national religious ministries.

In *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 759 note 12 (1967) the Court noted that at that time there were over 2,300 separate taxing authorities with differing sales and use tax rates. The Court ruled that it was unreasonable to impose use tax collection responsibility on merchants whose only contact with a State is sending materials to customers by mail or common carrier. A little over two decades later, there are over 7,000 such taxing jurisdictions.[6] We are now in a regulatory climate where the imposition of use tax liability on a national religious ministry is impermissible because it would severely burden the ministry by getting it bogged down in a morass of filing requirements and audit procedures that differ among the thousands of taxing jurisdictions where the ministry might have adherents.[7]

As the particular statements of interest in this brief illustrate, *supra*, at 1-6, the sheer complexity of this form of taxation, amply illustrated in the tables accompanying the appellant's brief, means that the cost of compliance for these religious ministries would be so high that many of them will hesitate to engage in a core religious activity. The cost of the burden on churches

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[6] See Table 2 in Appendix A to Appellant's Brief (listing welter of varying sales and use tax rates by states and selected taxing jurisdictions).

[7] See Table 3 (listing licensing requirements, imposition of criminal sanctions for noncompliance with sales and use tax laws, and other regulations relating to these laws) and Table 4 listing monthly, bi-monthly, quarterly, semi-annual or annual filing deadlines among the several states and even within the same state) in Appendix A to Appellant's Brief.

should not be measured by direct cost of paying *sales* tax; that burden may be small.[8] But the hidden, indirect cost of administering the multi-state burden of collecting and remitting *use* tax would be phenomenal.[9]

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[8] Independent Sector recently sponsored a national survey of the activities and finances of religious congregations in the United States. The survey was conducted by the Gallup Organization, and the findings are analyzed by Virginia Hodgkinson, Murray Weitzman, and Arthur Kirsch in a publication entitled *From Belief to Commitment* (1988). According to this study, only 1% of revenue of churches derive from "sales" of products or literature. Table 4.23, *id.* at 47. That figure would probably be significantly higher in the case of national religious ministries such as amici, for whom the distribution of religious literature to their constituents is a major activity.

[9] To support its contention that use tax collection liability would be excessively burdensome and entangling, appellant made the following offer of proof at trial: "The accounting involvement to collect, report, and file sales and use tax returns in all of these taxing jurisdictions throughout the United States would be an insurmountable burden for churches to bear in regard to the expense of distributing their religious message. The accounting and legal involvement required would be: (1) to determine the tax in each different location; (2) to keep track of all of the changes in that tax on at least a monthly basis; (3) to collect the different tax from individuals in each of those locations; (4) to report the different tax; (5) to secure and file returns in each of those locales; (6) to respond to audit inquiries in each of those locales; (7) to devise some method in many jurisdictions of advertising the price and the tax rate so that the individuals solicited for such donations or sales would know the amount of tax to send with their request so that the proper amount could be collected; (8) to develop a procedure to dub a different advertisement onto each tape for each different television station locale, which now exceeds 600 local television stations plus thousands of local cable outlets the dubbed advertisement would have to be flexible enough to state the varying tax rates for the varying locations to which [appellant] would be required to mail religious-content materials within the viewing area of that station or cable outlet); (9) to prepare receipts to each of these individuals to properly account for the proper rate of tax; (10) to establish and maintain an extensive library constantly to provide for each of the thousands of taxing jurisdictions within the United States

In the aggregate, the cumulative burdens of attempting to comply with a host of complex and confusing regulations would transform a national religious ministry into a tax collection agency. See *Bellas Hess*, *supra*, 386 U.S. at 759-760, and *Murdock*, *supra*, 319 U.S. at 115.

Faced with averting this undesirable end, religious leaders would then be forced to curb their religious activity, at least in jurisdictions that would assert regulatory jurisdiction over the national ministry by virtue of an occasional presence of a religious leader in that state for a pastoral visit or an evangelistic crusade. In this way, contrary to the view expressed by the plurality in *Texas Monthly*, the burden of sales and use tax, considered together as a unitary taxing mechanism, would impose severe and unjustifiable regulatory burdens on national religious ministries.

This Court should avoid that result for the same reason that prompted its concerns over the risk of chilling the First Amendment rights of freedom of speech and of the press. Especially relevant are those cases where the First Amendment bars liability for false and defamatory statements, themselves of no First Amendment concern, because the risk of liability for mistakes would deter true speech as well as false, or would diminish the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As Justice Brennan noted in *Sullivan*, the risk of incurring liability for damages from libel actions will cause speakers to "steer far wider of the unlawful zone." *Id.* at 277-79, quoting *Speiser v. Randall*, 357 U.S. 513, 526

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in state, county, municipal, and other special taxing districts." J.A. 204-209.

(1957). The concern that newspaper editors would censor themselves led the concurring Justices in *Sullivan* to advocate an absolute rule protecting the press against damages for the libel of a public official. *Id.* at 293 (Black, J., concurring) and at 297 (Goldberg, J., concurring). See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (even private figure must bear burden of proving that defamatory speech is false, lest true speech be deterred).

This Court has afforded special protection to media defendants because they are primary institutions whereby our cherished rights of freedom of expression and of communication are preserved. *Sullivan*, 376 U.S. at 266. Since churches are the primary institutions whereby freedom of religion is preserved, a similar logic has led some courts to recognize that religious communities are entitled to at least as much protection as commercial newspapers, by extending the *Sullivan* rule to church defendants in a libel action. *McNair v. Worldwide Church of God*, 197 Cal.App.3d 363 (1987).

In *Sullivan*, moreover, the Supreme Court expressly adverted to the potential chilling effect of imposing punitive damage awards against media defendants in defamation actions brought by a public official. 376 U.S. at 262, 267. And the Court fashioned a constitutional rule that malice could not be assumed or inferred, but must be shown to be actual in a particular instance. Considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" *id.* at 270, indeed, that "erroneous statement is inevitable in free debate," *id.* at 271, the Court required that in order to prevail in a defamation action, a public official must prove "actual malice," or that the publication was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280.

In *Gertz v. Robert Welch*, 418 N.S. 323 (1974), this Court extended the *Sullivan* rule to prohibit imposition of punitive damages on media defendants, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

Among the rationales offered for the result in *Gertz*, two have special relevance to this case. First, Justice Powell noted the danger of a chilling effect arising from the "largely uncontrolled discretion of juries to award damages where there is no loss." This possibility "unnecessarily compounds the potential of any system of liability for defamatory falsehood to *inhibit the vigorous exercise of First Amendment freedoms*" and "unnecessarily exacerbates the danger of media self-censorship. . . ." *Id.* at 349-350 (emphasis added).

Second, Justice Powell noted that "the doctrine of presumed damages invites juries to *punish unpopular opinion* rather than to compensate individuals for injury sustained by the publication of a false fact. . . . *juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.*" *Id.* at 349-350 (emphasis supplied). See also *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50, note 14 (1979) ("punitive damages may be used as a *weapon to punish unpopular defendants*").

As is evident in this record, the State of California did not move in on a large, in-state, "established" religious denomination with political clout in the community and make an issue of the sale of religious tracts and pamphlets in the foyers of their churches. As was the case in *Murdock*, the force of the law was brought to bear with special force against a vulnerable, out-of-state televangelist. This further concern about the actual operation of imposing a tax collection liability on a fledgling

national religious ministry may further chill the outreach efforts of that group.

Appellee would have this Court unleash the administrative discretion of the taxing authorities on the churches in the exercise of their religious ministry without any serious limits to that discretion arising out of deference to delicate First Amendment values. As this record makes all too plain, the tendency of zealous tax officials to overbear a recalcitrant taxpayer by threatening criminal sanctions knew no limits even in the discretionary application of such threats to a bona fide religious ministry. See Letter of Lamb to counsel for appellant, cited *supra*, at 16. As Justice Brandeis stated in another context, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

One very good reason why this Court should not give the appellee a free hand to tax religious ministry is the inevitability that, given a free hand, the taxman would strike some religious ministries, but not others. The de facto preferences given to those religious groups whose practices the taxman chooses to ignore are the very thing that the establishment concern of the religion clause is meant to avoid. *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, this Court held that governmental action that favors churches that rely on one form of fund-raising over others is subject to strict scrutiny and can be upheld only upon a finding of compelling govermental justification.

After *Hernandez v. Commissioner of Internal Revenue*, 109 S. Ct. —, Nos. 87-693 and 87-1616 (1989), it seems that this Court will require the showing of a compelling state interest in a tax case only where a tax statute is plainly discriminatory on its face. But that misses the point that administrative discretion, unguided

and unchecked, can work significant mischief by applying "with an evil eye and an unequal hand" a law that is "fair on its face and impartial in appearance." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886); see also *Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct 2138 (1988). At the very least, this Court should not be blind to the obvious reality that states will overlook tax enforcement that is not economically or politically feasible, and the concomitant danger that the type of taxes at issue in this case will be selectively enforced more frequently against highly visible or unpopular ministries than on large and popular denominations. To impose a tax on religious bodies that distribute religious materials to their adherents in "exchange" for a payment or donation, but not on those that raise money from their adherents in other fashions, violates the principle announced in *Larsen v. Valente, supra.*

Here the potential threat to protected activity is not the imposition of damages in a libel action, but an official act purporting to transform the church into an agency of the state for purposes of tax collection. Here the danger to First Amendment values is posed by the high cost of compliance with the administrative burden of collecting and remitting use tax for the distribution of religious literature. The net result in both contexts is the same. Protected activity will be chilled unless the Court fashions a First Amendment limit on the governmental acts that produce the chilling effect.

This Court has intimated in dicta that *equal* treatment of non-commercial religious organizations and commercial news organizations may be about as far as the First Amendment ought to go. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987); *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Rev.*, 460 U.S. 575 (1983). Amici, however, suggest that there are important reasons why religion enjoys special constitutional protection that is not afforded to commercial

activities. First, unlike for-profit corporations such as the media defendants in *Sullivan* and *Philadelphia Newspapers*, appellant and the amici are *not-for-profit* religious organizations entitled to the full protection afforded to their ministries by the religion clauses of the First Amendment.[10] As Justice Brennan observed in *Amos*, the distinction between for-profit activity and not-for-profit activity may be crucial to the determination of whether a religious organization is entitled to special treatment in its employment policies. 107 S. Ct. at 2872 (Brennan, J., concurring).[11]

Second, religious freedom is not merely a redundant way of saying freedom of speech and of the press. The text of the First Amendment itself singles out religion for special protection.[12] For example, religion is unique among our freedoms in part because government is pro-

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[10] In his concurring opinion in *Texas Monthly*, Justice Blackmun did not endorse the view that a religious exemption is infirm if not also enjoyed by every imaginable charitable organization, but simply noted, correctly in the view of amici, that the benefit of the religion clauses of the First Amendment extend to a wide variety of religious claims and of views about transcendence. 109 S.Ct. at 906.

[11] The consistency of this rule is underscored in the brief amicus curiae filed by the National Council of Churches in this case. In this brief, the amicus notes that religious organizations have since 1976 been under a legal obligation to pay tax on income derived from business that is not related to the exempt purpose of the religious organization. See Amicus Brief of National Council of Churches. The record in this case makes plain that this case is narrowly focused on the power of the government to tax the churches in the direct transmission of their religious messages to willing believers.

[12] See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 9; Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Pub. L. Forum 325 (1985); and Pepper, *Reynolds, Yoder and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 347 n. 171 (religion is inherently valuable, vulnerable, and worthy of special protection).

hibited from directly engaging in or promoting religion, but is not forbidden from entering the "marketplace of ideas" as one of the speakers.

Third, precisely because of the expanding scope of regulation in the modern welfare state, this Court should recognize the special character and needs of religion in today's society, in order to maintain the vitality and independence of religious life as it was at the time of the framing of the First Amendment.[13]

Finally, this Court should give special protection to religious freedom because it is the first of our civil liberties and the predicate for our other freedoms. In the words of the Williamsburg Charter:

> "The First Amendment Religious Liberty provisions have both a logical and historical priority in the Bill of Rights. They have logical priority because the security of all rights rests upon the recognition that they are neither given by the state, nor can they be taken away by the state. Such rights are inherent in the inviolability of the human person. History demonstrates that unless these rights are protected our society's slow, painful progress toward freedom would not have been possible. The First Amendment Religious Liberty provisions lie close to the heart of the distinctiveness of the American experiment. . . . If religious liberty is neglected, all civil liberties will suffer. If it is guarded and sustained, the American experiment will be the more secure."

The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses at 11-12 (1988).[14]

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[13] See, e.g., Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 522-526 (1968); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22.

[14] This document was signed by national leaders in Williamsburg, Virginia on the 200th anniversary of the call for a Bill of

Thus, to the extent that an exemption for religious organizations is both narrowly focused on the appropriate reasons that give rise to it and broadly available to all competing religious views,[15] a stronger claim can be made for a carefully tailored exemption of this sort than for the view of the plurality in *Texas Monthly* that an exemption is presumptively invalid if expressly grounded in free exercise concerns and thus unavailable to those who do not fall even within a broad, all-encompassing definition of religion. *Welsh v. United States*, 398 U.S. 333, 342 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). For example, those who seek an exemption from military service may not claim it if the basis for their objection to this general requirement stems solely from political opposition to governmental policy. *Welsh*, *supra*, 398 U.S. at 342; *Seeger*, *supra*.[16] Nor did this Court see fit to extend to free speech advocates of educational pluralism the exemption from Wisconsin's compulsory school attendance law that was required in *Wisconsin v. Yoder*, 406 U.S. 205, 216, 233 (1972).

The application of the chilling effect rationale to the context of religious freedom is by no means novel. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963),

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Rights, June 25th, 1988. A copy of this document has been served on the parties and all amici, and has been deposited with the Librarian of the Court.

[15] See *Texas Monthly*, *supra*, 109 S. Ct. at 906 (Blackmun, concurring).

[16] Exemption from military service is, moreover, an excellent illustration of an accommodation of religion that has been deemed appropriate in our society since the time of the First Continental Congress, although it is not constitutionally required. See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22-23. It is far too late in the day to maintain that an exemption is permissible under the establishment clause only if required under the free exercise clause. See, e.g., *Walz*, *supra*, 397 U.S. at 673 (permissible state accommodation of religion not limited to the noninterference mandated by the free exercise clause).

this Court invalidated an impermissible condition upon the receipt of a welfare benefit that would have deeply affected the religious freedom of the welfare claimant. As Justice Brennan noted in *Sherbert*:

> "the pressure upon [the welfare claimant] to forego the practice of her religion is unmistakable. The ruling forces her to choose between following the precepts of her religion and foregoing benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against her for her Saturday worship."

Id., 347 U.S. at 404.

More recently, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court declined to enforce the purported jurisdiction of the National Labor Relations Board over church-operated secondary schools. Finding "no clear expression of an affirmative intent by Congress" to include teachers at church-operated schools within the Board's jurisdiction, the Court chose in this way to avoid the resolution of "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 504, 507. It did so not because the prospect of collective bargaining by teachers in parochial schools posed a threat to the doctrinal or ethical beliefs of Roman Catholics, which since the late nineteenth century has expressly taught that workers should enjoy the right to organize and to bargain collectively over terms of employment. The reason why this Court declined to extend the jurisdiction of the Labor Board over the church-operated school in *Catholic Bishop* was that the attendant risk of litigation over unfair labor practice charges might deter the bishop's exercise of his right to control the religious mission of the school. *Id.* at 502-504. See also *Corp. of Presiding*

Bishop v. Amos, 107 S.Ct. at 2873 (1987) (Brennan, J., concurring) (danger of chilling religious activity by close judicial inspection of its character.)

Where, as here, amici can show that a state policy would clearly have a chilling effect on the free exercise of religious ministry, this Court should rely on the chilling effect rationale to afford to protected religious activity the "breathing space" it needs to flourish. *NAACP v. Button*, 371 U.S. 415 (1963). It is especially troubling that the imposition of a cumbersome duty to collect taxes from religious adherents will operate to chill the distribution of religious literature. The chilling effect on this form of ministry will be greatest in situations such as this case where the minister is attempting to reach the "unchurched," or those without any religious convictions. This reality disproportionately burdens one of the few absolutely protected constitutional rights—the right of the religious speaker to announce one's own religious faith to all who care to hear it, and the right of the potential believer to uninhibited flow of information directly related to the precious right of religious conversion. A chilling effect that has its greatest impact on the exercise of these rights is especially offensive to the First Amendment.

Like the early Christian church, national evangelical ministries typically grow slowly from state to state. In the experience of amici, it takes many years of ministering throughout the country before a significant body of followers is developed. It is often only after a long period of such development that the leadership of these evangelical ministries begins pastoral visitation of the followers in many of these states. The timing of such pastoral visits is surely one of those religious "usages and customs" that this Court long ago deemed beyond the power of government to influence or control. *Watson*, *supra*. The free exercise of a pastor to visit his flock and the free exercise of a national religious ministry

to distribute religious literature to its adherents must not be restricted to those willing to bear the considerable burden of compliance with one of the most complex and confusing taxes ever designed by governmental officials.

CONCLUSION

For these reasons, the judgment of the Court of Appeal of California should be reversed.

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Supreme Court of the United States

October Term, 1989

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

On Appeal From The Court Of Appeal, State Of California, Fourth Appellate District, Division One

BRIEF OF NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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No. 88-1374

In The

Supreme Court of the United States

October Term, 1989

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

Appellee.

On Appeal From The Court Of Appeal, State Of California, Fourth Appellate District, Division One

INTEREST OF THE AMICI CURIAE

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty-two national religious bodies having over forty million constituents in the United States. It is commonly known as the National Council of Churches. Its public positions are based on policies adopted by its Governing Board, composed of about two hundred fifty members selected by the member denominations in proportion to their size and support of the Council. The Governing

Board has adopted several policy statements affirming and defining religious liberty.

The positions taken in this brief implement the Council's long-standing position on taxation of religious activities. The Council has long supported the federal tax on unrelated business income and similar taxes at the state level. But the Council has insisted that government cannot tax the essential religious functions of churches.

In this case, California has taxed the dissemination of religious messages. This tax is a tax on the exercise of religion. It is a serious threat to the religious functions of the Council and all its member churches. Thus, the Council is interested in this case because of the direct threat to the religious liberty of its own members, and because of its commitment to religious liberty for all.

SUMMARY OF ARGUMENT

The state can tax religiously affiliated commercial enterprises, but it cannot tax the exercise of religion. The tax in this case is a tax on the dissemination of religious messages, and thus a forbidden tax on the exercise of religion.

This case is indistinguishable from *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and the tax at issue here is actually more burdensome than the tax in *Murdock*.

Tax immunity here is wholly consistent with *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), where a tax exemption was struck down because of content discrimination. But a majority in that case recognized that the

Constitution requires some kind of tax immunity for religious exercise.

Tax immunity here is also wholly consistent with *Hernandez v. Commissioner*, 57 U.S.L.W. 4593 (June 5, 1989), where the Court refused to allow a payment for religious services as a deduction against tax on secular income.

Tax immunity in this case would not violate the establishment clause. The state does not establish religion by leaving it alone. Tax immunity for religion is more neutral than taxation of religion, and the establishment clause requires only that the immunity be neutral with respect to all views about religion.

ARGUMENT

I. The Government Cannot Tax the Not-for-Profit Dissemination of Religious Messages.

A. The Key Distinction Is Between a Tax on the Exercise of Religion and a Tax on Religiously Affiliated Commercial Enterprises.

The Council has never contended that all activities conducted by churches are exempt from tax. Twenty years ago, the Council urged Congress to subject churches to the tax on unrelated business income, and we adhere to that position today.

It is equally clear that government cannot tax the exercise of religion. A tax on prayers or sermons would obviously be unconstitutional. This Court has held that a

tax on proselytizing is unconstitutional. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944). This case is about the long-standing distinction between religious exercise, which cannot be taxed, and religiously affiliated commercial enterprises, which can be taxed.

B. This Case Is Controlled by Murdock v. Pennsylvania.

The tax in this case plainly invades the constitutionally protected tax immunity. This is a tax on proselytizing, differing from *Murdock* only in detail. The tax here falls directly on the dissemination of indisputably religious messages. The practical effect is that the state taxes the distribution of religious books and audio recordings.

The tax here is facially neutral, but so was the tax in *Murdock*. 319 U.S. at 115. The religious messages here are sold to those who can afford to pay, but that was also true in *Murdock*. For the reasons so eloquently stated in *Murdock*, a charge for the cost of dissemination does not make dissemination of religious faith a taxable event. *Id.* at 111.

The court below refused to follow *Murdock*. It argued that the tax in *Murdock* was a privilege tax in a flat amount, while the tax here is a sales and use tax computed on the value of the book or the sum contributed for it.

This distinction in how the tax is calculated is irrelevant to the reasons for the constitutional immunity. The essential fact is that the tax falls on the distribution of

religious literature, and not on some commercial enterprise unrelated to core religious functions. Here as in *Murdock*, if the churches would refrain from any effort to recoup the cost of distributing religious literature, they would not owe the tax. Indeed, because of the interstate jurisdiction problems here, appellant Ministries would owe no tax if it had refrained from conducting religious "Crusades" in California.

It is no distinction that Ministries could raise the suggested charge for its literature to cover the amount of the tax. The Jehovah's Witnesses in *Murdock* could have done that too.

The practical impact of the tax here is much greater than in *Murdock*. Murdock owed $1.50 per day; Ministries owes over $118,000 for 52 days in California. The burden of calculating and collecting the sales and use tax is much greater than the burden of calculating the flat license fee in *Murdock*. The burden of allocating the use tax on mail order dissemination, among fifty states and to local governments with independent taxing authority or with extra rates appended to the basic state rate, is far greater than the burden of allocation in *Murdock*. In all sorts of ways, this tax compares unfavorably with the tax in *Murdock*. The method of calculation is a distinction without a difference.

Taxation of the magnitude at issue here does not mean just that each church has to pay a few extra dollars to the government. Some churches will not be able to pay. Some churches will have to eliminate religious programs; others will lose their property to tax foreclosure sales or be driven out of existence.

These problems are illustrated by *International Society for Krishna Consciousness v. Board of Equalization,* now pending in the California Court of Appeal (Notice of Redetermination No. SR AS 18-649831). The Board assessed $43,000 in back taxes on ISKCON's distribution of religious literature. When ISKCON sought to negotiate a payment plan, the Board conducted a probing audit of its financial records and demanded that it cut religious programs to free money to pay the contested taxes. The Board also recorded a tax lien on all the church's property. ISKCON was at risk of losing all its property, including tax exempt property used solely for religious purposes, because of its inability to pay the sales and use tax on its distribution of religious literature.

C. A Constitutional Tax Immunity in This Case Is Wholly Consistent With Texas Monthly v. Bullock.

The position urged here is wholly consistent with *Texas Monthly, Inc. v. Bullock,* 109 S. Ct. 890 (1989). *Texas Monthly* was this Court's first effort to grapple with the difficult problem of defining the boundaries of the constitutionally compelled tax immunities and permissible tax exemptions for religious exercise. A majority in *Texas Monthly* agreed that the discriminatory exemption there must be struck down, but it could not agree on the rationale. A different majority seemed to agree that the free exercise clause requires some kind of tax immunity for the dissemination of religious ideas. *See* 109 S. Ct. at 905-06 (Justices Blackmun & O'Connor, concurring); 109 S. Ct. at 913-14 (Justices Scalia & Kennedy, and the Chief Justice, dissenting).

At the heart of the problem in *Texas Monthly* was a deviation from content neutrality. The Texas statute did not merely distinguish religious speech from commercial speech. The Texas statute distinguished not-for-profit speech about religion, and about fundamental values, on the basis of the values expressed. These content distinctions went to the very core of the First Amendment. Christian literature was tax exempt, but atheist literature and secular humanist literature was taxed. Literature from churches was tax exempt, but a not-for-profit exposé of corruption or misconduct in churches would be taxed. Religious literature was tax exempt, but philosophical, ideological, and political literature would be taxed.

A majority agreed that the narrow boundaries of the exemption in *Texas Monthly* were forbidden, without being able to agree on boundaries that would be permitted. The three opinions constituting the majority suggested or implied several possible boundaries. *Id.* at 900 (Justices Brennan, Marshall, & Stevens); *id.* at 905 (Justice White); *id.* at 906-07 (Justices Blackmun & O'Connor). Unable to agree, and with the question of permissible boundaries not actually presented, the Court properly left it to Texas in the first instance to decide whether to redefine the boundaries of its exemption.

Texas Monthly does not hold that the state can tax the exercise of religion. Texas was not attempting to do so, and no religious organization was either a party, intervenor, or amicus in that case. The question whether churches are constitutionally entitled to tax immunity in some circumstances was simply not presented.

Here that question is presented. This case requires the Court to reaffirm and apply the principle that religious proselytizing cannot be taxed.

Like *Texas Monthly,* this case does not require the Court to define the precise boundaries of the constitutionally required immunity, or the perhaps broader boundaries of constitutionally permissible exemptions. *Texas Monthly* held only that an obviously discriminatory exemption is constitutionally forbidden; this case requires only the holding that *some* exemption is constitutionally required. The task of defining the precise boundaries of this exemption in a way most consistent with content neutrality must again be left to the states in the first instance, and to future litigation if necessary.

D. This Case Is Wholly Different from Hernandez v. Commissioner.

This Court recently held that a fixed and mandatory payment, made in exchange for religious services, is not a tax deductible charitable contribution. *Hernandez v. Commissioner,* 57 U.S.L.W. 4593 (June 5, 1989). *Hernandez* has a superficial resemblance to this case; both involve taxes and a charge for a thing of religious value. The similarity ends there.

The tax at issue in *Hernandez* was a tax on the secular income of a member of the church. Hernandez owed tax on his salary or some other indisputably secular income. He had received that income and incurred tax liability before the occurrence of any religious event at issue in the case. He then claimed a deduction, arising from his

religious activities, that would in effect have sheltered some of his secular income from tax.

Here the tax falls on the religious activity itself. The church owes tax because it distributed religious literature. Hernandez owed tax because he had secular income. Hernandez sought to reduce his tax because of religious activity; California seeks to impose a tax because of religious activity. Hernandez sought to pay less than the full cost of his religious activity, by recouping part of it through a tax deduction; California seeks to make churches pay more than the full cost of their religious activity, by adding the cost of a tax.

II. Tax Immunity for Dissemination of Religious Messages Does Not Establish Religion.

The rule that the state may not tax the exercise of religion does not itself establish religion. The state does not establish religion by leaving it alone.

A contrary view could arise only from a fundamental misconception of the establishment clause. The two religion clauses are not at war with each other, one pro-religion and one anti-religion. In the words of the Williamsburg Charter, a bicentennial document signed by prominent national leaders from a wide spectrum of political and religious perspectives, the two religion clauses are "mutually reinforcing provisions," "a brilliant construct in which both no establishment and free exercise serve the ends of religious liberty and freedom of conscience."

Together, the two clauses ensure government neutrality toward religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 53 n.37, 60-61 (1985); *Thomas v. Review Board*, 450 U.S. 707, 717 (1981). They leave religion wholly to private choice, as uninfluenced by government as possible.

Tax immunity is the course most consistent with religious neutrality. Failure to tax the dissemination of religious literature will not encourage anyone to begin proselytizing who did not already desire to do so. Failure to tax proselytizing does not reduce the cost of proselytizing. But taxation does discourage proselytizing, by increasing the cost. The administrative burden of collecting and remitting use tax for thousands of separate jurisdictions escalates that cost prohibitively.

This Court has held that a tax exemption for property used exclusively for religious worship does not violate the establishment clause, at least if analogous subjects of taxation are also exempt. *Walz v. Tax Commission*, 397 U.S. 664 (1970). That holding was correct then and it is correct now. *Walz* and *Murdock* are twin cases, guaranteeing religious liberty under both religion clauses.

The constitutionally required neutrality is achieved by equal tax exemptions for all literature about religion, both pro and con. It is not achieved by equally burdening all exercises of religion. The argument that any exemption is prima facie an establishment leads to the absurd conclusion that churches should generally be taxed and regulated to the same extent as business corporations. But that would leave nothing of the free exercise clause. The exercise of religion is not free when it is taxed. The free exercise clause requires tax immunity, and nothing in the establishment clause forbids it.

Taxation of religion inevitably departs from neutrality in another way. Small and unpopular religions, the religions of minorities, are subject to disproportionate enforcement. Consider the litigants in the cases discussed in this brief. *Murdock* targeted the Jehovah's Witnesses; *Hernandez* targeted the Scientologists; the *ISKCON* case in California targeted the Hare Krishnas; and this case targeted Jimmy Swaggart Ministries. It is no accident that each of these religious groups has been the victim of widespread public hostility. *Walz* and *Texas Monthly* are not exceptions; those were not tax collection suits, but abstract litigations in which no religious organization was represented. As is so often true, the assault on civil liberties begins with the marginal groups in our society. This assault may eventually reach mainstream groups as well, but enforcement will never be even-handed.

CONCLUSION

The National Council of Churches urges the Court to reaffirm the long-standing rule that the dissemination of religious literature cannot be taxed. This rule is central to the free exercise of religion, and of great practical importance to all members of the Council.

The judgment below should be reversed.

Respectfully submitted,

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October Term, 1988

The Jimmy Swaggart Ministries,
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Board of Equalization of California,
Appellee

On Appeal from the Court of Appeal, State of California Fourth Appellate District, Division One

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Does a state violate the establishment clause when it passively refrains from collecting revenue because of a constitutional immunity from sales and use tax on the distribution of religious literature by a church to its own members?

II. Does a state have sufficient nexus to impose sales and use tax liability on an out-of-state religious organization for its distribution of religious literature to its religious adherents either by virtue of the conducting of occasional religious rallies within the taxing state, or by virtue of the use of the mails by the out-of-state religious body to distribute religious literature to its religious adherents within the taxing state?

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS

The National Taxpayers Union (NTU) was founded in 1969 as a citizens' lobby on tax matters. NTU is a non-profit membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all 50 states, NTU represents 200,000 members.

The sales and use tax laws of the thousands of taxing jurisdictions that rely on this means of revenue production are a patchwork quilt that was formed in a process responsive to the tug and pull, the rough and tumble of American politics.[1] Under these circumstances, it is quite plausible that economic burdens might fall - now here and now there - without perfect symmetry. The

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1 As the Tables in the Appendix to Appellant's Brief reflect, it might be more accurate to describe these laws as a jumble or a maze. See Appellant's Br., A-1 et seq.

redress, if any, for these uneven outcomes, will normally have to be through the same political process that created the perceived flaws in the structure. For that very reason, amicus regularly engages in testimony to Congress and other legislative bodies about issues affecting the interests of taxpayers.

But in our constitutional order there are some things that simply lie beyond the power of the government to tax at all. In the view of the amicus, the distribution of religious literature by a church[2] to its members is one of them. To delineate appropriate limits on the taxing power, amicus also engages in selected litigation.

The limit that the First Amendment Religion Clause places on governmental authority to impose burdensome sales and use tax liability on religious bodies for the distribution of religious literature to their religious adherents was severely eroded by the decision below. NTU recognizes that religious freedom is one of the precious few limits on the government's power to take property away for its own ends. The mere fact that such restraints in our system are few does not mean that they are not precious.

NTU has had extensive experience in tracking the exponential growth of the sales and use tax as a major source of revenue for state and local governments, especially after the recent taxpayers' revolts that reduced and restricted the property tax in several states, including California and Massachusetts. NTU has, moreover, participated in extensive study of the efforts of state and local governments to erode the restraints on their taxing authority defined by this Court in its interpretation of the Commerce Clause and the Due Process Clause. NTU has testified before the appropriate committees of Con-

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2 The term "church" in this brief refers not only to traditional religious groups, but also to "nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly, Inc. v. Bullock* 109 S. Ct. 890, 906 (1989) (Blackmun, J., concurring); see also *Welsh v. United States*, 398 U.S. 333 (1970); and *United States v. Seeger*, 380 U.S. 163 (1965).

gress about the constitutional dangers and policy folly of eroding those restraints through ill-considered legislation that would unleash the taxing authority of the states and local governments without a showing of adequate nexus between a taxpayer and a taxing entity. NTU is thus in a unique position to advise this Court about the tax policy implications of imposing sales and use tax liability on an out-of-state religious body for distribution of religious literature to its members within the taxing state.

NTU submits this brief as amicus curiae in support of appellant. The parties have consented in writing to the filing of this brief, and copies of the consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case provides an excellent opportunity for reassessing the view that tax exemptions are always the functional equivalent of a governmental subsidy. Although frequently viewed as a "subsidy," a pure tax exemption is not the same as a direct governmental outlay. In the First Amendment context, above all, it is imperative to refrain from painting with a brush too broad. The failure to differentiate exemptions from subsidies leads to unnecessary conceptual difficulties and to results, illustrated by the decision below, that are at odds with important constitutional limits on governmental power.

The California Court of Appeal ruled in this case (a) that the State of California may impose sales tax for the distribution of religious literature to religious adherents attending occasional religious rallies in California, and (b) that the State of California may impose use tax liability on an out-of-state religious body when it uses the mails to distribute religious literature to religious adherents in California. Neither conclusion is correct.

The First Amendment Religion Clause precludes the direct imposition of sales tax liability on the transmission of a religious message by a preacher to his religious adherents. Acknowledging the immunity of religious bodies from this form of taxation on the distribution of religious

literature does not offend the prohibition against an establishment of religion because a merely passive restraint on the collection of revenue by the government does not constitute an impermissible direct governmental subsidy to religion.

This conclusion is sound for two reasons. First, a limited immunity of religious bodies for the distribution of religious literature is required to respect the separation of church and state. Second, the history of repugnance to taxes on knowledge informs the current discussion over whether a state may impose sales tax on a religious body for the distribution of religious literature to its members.

In the light of these considerations, it makes little sense to say that the Constitution requires a particular form of tax immunity, and then to characterize that immunity as though the government were "subsidizing" the person who enjoys the immunity. That is to misunderstand the nature both of an immunity and of a subsidy. On this basis, amicus urges this Court to adhere to its precedents establishing immunity from taxation for religious preachers distributing religious literature. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944).

Amicus also urges this Court to adhere to its precedents requiring continuous presence, not mere occasional contacts of an out-of-state party, in order to establish sufficient nexus with a taxing jurisdiction for purposes of use tax liability. See *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977); *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Under these cases, it is clear that the Commerce Clause and the Due Process Clause preclude a state from exercising jurisdiction over a person outside its borders unless there is sufficient nexus.

The Board of Equalization predicated its claim to jurisdiction on the occasional presence of a preacher in the state to conduct a religious meeting. It is impermissible to base the jurisdiction of the state to tax on

an event manifestly involving protected noncommercial, religious speech. Even if it were permissible to establish nexus on the basis of the clearly protected activity of preaching, the infrequent visits of the appellant to California are insufficient under the precedents of this Court on nexus. Neither may nexus with California be predicated on the mere use of the federal instrumentality of the mails by a preacher in Louisiana to distribute religious literature to religious adherents in California.

In the view of amicus, the teaching of this Court in *Bellas Hess* on nexus is a bedrock foundation for a proper view of the limits of the taxing authority of state and local governments. Even if a majority of this Court were inclined to modify *Bellas Hess* in some way, this case is not the occasion to do so. In its present posture before this Court, this case is focused primarily on important First Amendment freedoms. For this reason, amicus urges this Court to avoid dictum in the resolution of this case that might cast doubt on the nexus requirements governing the taxation of commercial enterprises that operate in interstate commerce.

ARGUMENT

I. The Establishment Clause is not Violated When the Government Passively Refrains from Collecting Revenue from a Religious Body for the Distribution of Religious Literature.

In *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), this Court recently invalidated a statute that exempted from sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Tex. Tax Code §151.312 (1982). A plurality of three Justices was of the view that, "when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause." *Id.* at 894. One of the reasons suggested in support of

this view was that every "tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious "donors."'" *Id.* at 899, citing *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983). For the reasons offered below, amicus is of the view that this conclusion sweeps too broadly.

Appellant has suggested plausible grounds on which to distinguish this case both from *Texas Monthly* and *Bob Jones*. See Appellant's Brief, Part I. Amicus does not repeat those distinctions here, but simply makes three observations about *Texas Monthly* and this case. First, the plurality's conclusion that the Texas statute could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," 109 S. Ct. at 899, was reached in a case where the defense of the constitutionality of the sales tax exemption on Establishment Clause grounds was left to the State Attorney General, without the participation of any religious body in any capacity to inform the Court about the potential impact of imposing sales and use tax liability on these kind of organizations.[3] Second, amicus notes that this Court now has a case before it that might serve as a vehicle to address the question that some of the Justices in *Texas Monthly* deemed open, "the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization." 109 S. Ct. 907 (Blackmun, J., concurring). Third, the approach that amicus urges to this very question is that it is better to think of the issue in this case as whether a *preacher has a constitutionally grounded immunity from taxation on the direct communication of a religious message to his religious adherents*.

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3 The Amicus Brief of Evangelical Council for Financial Responsibility, et al., filed in support of appellant in this case, demonstrates that, contrary to the view expressed by the plurality in *Texas Monthly*, the imposition of sales and use tax liability on religious ministries engaged in the distribution of religious literature would gravely "inhibit religious activity." 109 S. Ct. at 901.

In light of these considerations, amicus urges this Court to distinguish carefully in this case between *direct cash subsidies* from the federal or state treasuries to support any particular religious view and purely *passive restraints on governmental taxing power*. Amicus agrees that most direct cash subsidies to a religious group to carry on its religious activities are prohibited under the Establishment Clause. But where, as here, the Constitution confers an immunity from taxation, mere passive restraints on the Taxing Power that are themselves constitutionally grounded should not be deemed to be impermissible governmental subsidies.

A. The Immunity of a Religious Body from Taxation on the Distribution of Religious Literature to its own Adherents does not Constitute an Impermissible Direct Governmental "Subsidy" to Religion.

As Justice White acknowledged in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980), "Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country." *Id.* at 662. Notwithstanding the controversy over the Religion Clause both within this Court and among the people of this country, there is a strong consensus that the nonestablishment principle forbids the placing of the "financial support of government" behind a particular religious belief. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). On this view, a direct cash grant from the public treasury to a religious body to support its religious activity under the purported authority of the Spending Power would be a clear instance of the kind of direct governmental subsidies that have been prohibited under the Establishment Clause.[4]

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4 See, e.g., *Bowen v. Kendrick*, 108 S. Ct. 2562, 2580-81 (1988); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947), and at 51 (Rutledge, J. dissenting) (objecting to governmental *appropriation* in support of religious edu-

The term "establishment of religion" meant many different things in the eighteenth century. But one of the salient characteristics common to various manifestations of an establishment was coerced collection of revenue from taxpayers by the government and the intentional redirection of that revenue to provide financial support to the religious activities of churches of which the taxpayers were not members. The practice of providing tax support for a preferred or "established" religious group was perhaps the most obnoxious feature of an "establishment of religion" against which the First Amendment took aim.[5]

The real point of this central teaching in Establishment Clause jurisprudence is that transfers of wealth to a religious body for its religious activities must in our constitutional order be made on a voluntary basis, not at the command of the government. That does not, however, mean that if the government refrains from taxing the religious body to which a private party makes a contribution, the *private party's* donation is thereby transformed into an *official governmental act.* That would be to miss the point of the state action requirement. For example, under Title VII of the Civil Rights Act of 1964, as amended, it would be clearly impermissible for the *government* to engage in employment discrimination on the basis of religion. But in *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987), this Court ruled unanimously that it is equally clearly permissible to allow *religious organizations* to take into account the religious commitments, if any, of

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cation).

5 See, e.g., James Madison, "Memorial and Remonstrance," cited in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 719-727 (1970) (Appendix II to opinion of Douglas, J., dissenting); T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986); W. McLoughlin, *New England Dissent: 1630-1833: The Baptists and the Separation of Church and State* (2 vols. 1971); and C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 20-24 (1964).

their own employees.[6] Thus "a law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* at 2868-2869.

The characterization of an immunity from taxation as an impermissible "subsidy" by the *Texas Monthly* plurality was not novel. But when that view was first put forward by the dissenting Justices in *Follett v. McCormick*, 321 U.S. 573 (1944), this Court expressly repudiated it. *Follett* was preceded by *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which this Court invalidated the imposition of a flat fee license provision on itinerant evangelists engaged in distribution of religious literature.[7] Because of this conclusion, the Court in *Jones v. Opelika II*, 319 U.S. 103 (1943) vacated the judgment it had reached one term earlier in *Jones v. Opelika I*, 316 U.S. 584 (1942). In *Murdock* Justice Douglas wrote that states and local governments could no more impose a license tax on itinerant evangelists distributing religious literature than it could require a local preacher to register with the government and obtain a license to preach. *Murdock* thus stands for the principle that the church is *immune from taxation* on its core activity of preaching or announcing a religious message to willing hearers or readers.

A year later in *Follett*, this Court extended to

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6 The fact that Congress has determined that private secular employers affecting commerce among the several states must also refrain from employment discrimination on the basis of religion is an excellent illustration of this Court's teaching in *Walz*, *supra*, that the "limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." 397 U.S. at 673. The church needs that kind of an exception. A secular employer does not. The church enjoys express constitutional protection in its internal affairs. A secular employer affecting commerce does not.

7 The opening brief for the Jehovah's Witnesses in *Murdock* noted that several state and lower federal courts had reached the conclusion that churches enjoy a constitutional immunity from taxation imposed on the distribution of religious literature. Petitioners' Brief, at 57-61 (citing cases).

preachers distributing religious literature in their own home towns the constitutionally mandated immunity it had granted to itinerant evangelists in *Murdock*. Although the progression from *Murdock* to *Follett* was hardly a momentous leap, it occasioned a strong dissent suggesting that this form of immunity constituted an impermissible "subsidy for the appellant's religion." *Follett*, 321 U.S. at 581 (Roberts, J., dissenting). That view was squarely rejected in the opinion of the Court and in Justice Murphy's concurring opinion. Justice Douglas explained for the Court that the conclusion that the church is immune from taxation on the proclamation of the gospel

> "does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege."

Follett, *supra*, 321 U.S. at 577-578 (citation omitted). Justice Murphy likewise noted: "It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom." *Id.* at 578-579 (Murphy, J., concurring).

The leading decision dealing with exemption of churches from the ad valorem property tax is *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 644 (1970). In *Walz*, the property tax exemption as applied to buildings used exclusively for religious worship was sustained in part precisely because it was not viewed as a subsidy. It seems clear that the Court intended to resolve this very question in *Walz*, for it squarely rejected the contention of the appellant taxpayer that New York's "grant of an ex-

emption to church property indirectly requires [him] to make a contribution to religious bodies..." *Id.* at 667. If it were a true governmental subsidy, that would have been inconsistent with the view of the *Walz* court that the basic purpose of the Religion Clause is "to insure that no religion be *sponsored or favored*...." *Id.* at 669.

The *Walz* court differentiated between a "direct money subsidy" and the "grant of a tax exemption" on the ground that the former would entail "a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed relationships for enforcement of statutory or administrative standards" while the latter "is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

In his concurring opinion in *Walz*, Justice Brennan noted that ardent separationists like James Madison and Thomas Jefferson strongly resisted Patrick Henry's proposal for a modest *subsidy* to pay teachers of Christian religion in each town in Virginia, but supported the *exemption* of church property from taxation, both at the state level and later as leaders in the federal government. *Id.* at 683-685. They evidently could not have done so if they had viewed the immunity of the church from taxation on its core protected activities as the functional equivalent of a direct subsidy, which - though as small as three pence - would have been enough to provoke their animated opposition. As Justice Brennan put it in *Walz*, "It is unlikely that two men [Madison and Jefferson] so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion." *Id.* at 685 (Brennan, J., concurring). Justice Brennan also acknowledged in *Walz*:

> "Tax exemptions and general subsidies ... are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a

> whole. An exemption, on the other hand, involves no such transfer.... Tax exemptions ... constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy."

Id. at 690-91 (Brennan, J. concurring).

The distinction between tax exemption and subsidy has long been recognized.[8] Recently it has become blurred, in part by federal budgetary analyses that purport to show the revenue loss from various tax credits, deductions and exemptions. For example, the device known as the "tax expenditure budget" is often used by legislatures to estimate the tax revenue lost for each budget function category under various forms of tax relief.[9] The device was introduced for the purpose of evaluating decisions about appropriating or *spending* the resources estimated to be available under various *taxing*

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8 As Professor Giannella put it: "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 553 (1968).

9 The concept of a tax expenditure budget is by no means neutral or noncontroversial. For example, one scholar attacks the very core of the device, the comparisons of revenue loss scenarios, as meaningless and unrealistic in the portrayal of their impact on economic activity: "A direct outlay by the government in the purchase of some good or service necessarily involves a direct participation by the government in the marketplace, as well as a direct preemption of the production inputs used to produce the good or service the government buys. Tax expenditures, in contrast, involve no such direct impact on the use of production inputs; rather the economic effect of a tax credit, deduction, preferential rate, etc., results from how the tax provision changes the relative costs and prices of goods or services, and how taxpayers will respond to such changes." M. Carter, *The Tax Expenditure Budget: A Critical Examination,* at 11 (Institute for Research on the Economics of Taxation, Washington, D.C., 1983).

measures.[10] That does not mean, however, that for constitutional purposes, there is no analytical difference between the Taxing Power and the Spending Power. Nor does it mean that the tax expenditure budget is a very useful concept in the area of religion. This is so because religion is one of the things (indeed, in the modern welfare state one of the only things) about which the American people neither expect nor desire the government to do any planning, for the obvious reason that religion in our constitutional order is not a legitimate governmental activity.

For these reasons, the amicus urges that this Court avoid thinking that every imaginable tax benefit enjoyed by a religious organization must be characterized as a "subsidy" for purposes of First Amendment analysis.

Amicus is aware that, in cases decided after *Walz*, this Court has occasionally suggested that both "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983); see also *Bob Jones University v. United States*, 46 . U.S. 574, 591 (1983) (characterizing both exemptions and deductions as making other taxpayers indirect and vicarious "donors").[11] It should also be noted, however, that the Court is equally capable of drawing appropriate distinctions when necessary.[12]

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10 Amicus notes, however, that since the introduction of the tax expenditure concept into federal budgetary planning, the budget deficit has grown exponentially.

11 On the distinction between exemptions and deductions, see, e.g., Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?* 28 Tax L. Rev. 37 (1972).

12 On the very same page in the United States Reports on which the sentence cited above occurs, Justice Rehnquist added the following footnote: "In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." 461 U.S. at 544, n. 3 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-676 (197); id., at 690-691 (Brennan, J. , concurring); id., at 699 (opinion of Harlan, J.).

This Court need not, then, lend its authority to those who imagine that our tax laws are driven by a passion for abstract coherence, as some of the "pure tax" theorists imagine. Debates about such matters are more appropriate in the legislative context of budget planning than in the task of constitutional interpretation that the judiciary must undertake. It should be of little or no concern to this Court whether the tax expenditure theory advanced by Professor Surrey[13] or some competing theory, such as the income base theory of Professor Bittker,[14] happens to be prevailing at any given moment. As Justice Black remarked in *Ferguson v. Skrupa*, 372 U.S. 726 (1963): "[Whether] the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Id.* at 732.

What this Court should not lose sight of is the larger principle that distinguishes between forbidden direct governmental subsidies to religious bodies for their religious activities and the mandatory or at least permissible passive governmental restraint on the collection of revenue from religious organizations.

To obliterate this distinction is unnecessary for the resolution of this case and is harmful to the whole concept of limited government that our Constitution is designed to secure. Events throughout the world where these constitutional limits do not obtain are a timely reminder that we should never succumb to the dangerous statist view that the government is the best judge of either the true or the valuable. As Justice Powell cautioned in his concurring opinion in *Bob Jones University v. United States*, 461 U.S. 574, 609 (1983), "provision of tax exemption to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on im-

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13 See, e.g, S. Surrey & P. McDaniel, *Tax Expenditures* (1985); and S. Surrey, *Pathways to Tax Reform* (1973).

14 See, e.g., Bittker and Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L. J. 299 (1976); and Bittker, *Churches, Taxes and the Constitution*, 78 Yale L. J. 1285 (1969).

portant areas of community life." *Id.* at 609 (Powell, J., concurring). In a similar vein, Justice Brennan noted in *Walz* that nonprofit organizations enjoy tax exemption because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." 397 U.S. at 609 (Brennan, J. concurring). At bottom, our society's commitment to private property and to the health of the private sector means that tax theory is incapable of being reduced to the proposition that the government is entitled to everything except that which it allows taxpayers to keep, which should be deemed a gift from the government.

If anything, the "subsidy" argument works against imposing sales and use tax liability on a church for the distribution of religious literature. As is the case generally with this form of taxation, there are enormous hidden costs of administering sales and use tax imposed on the seller. In 1986 Touche-Ross conducted an empirical study of the actual cost of sales tax collection responsibility on commercial mail-order firms, including a detailed on-site survey of sales and use tax burdens.[15] This study concluded that the average uncompensated net collection costs for the firms participating in the study averaged 15% over and above the tax itself, even after reducing the gross collection costs for the use of proceeds. These costs reflected employee costs, administrative costs, transaction/training costs, data processing costs, fees/bad debt costs and other absorbed costs. *Touche-Ross Study,* at 3-4.

If religious organizations such as the appellant were required to become use tax collectors for the thousands of jurisdictions that impose this form of taxation, their hidden costs of collecting and remitting this form of tax would not be any lower than for the secular merchants

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15 Touche-Ross, *A Study to Determine the Economic Impact on Mail-Order Firms of Multi-State Sales Tax Collection* (1986). A copy of this study has been served on the parties and has been deposited with the Librarian of the Court. It is cited in this brief as "Touche-Ross Study." The pages references in this brief are to the Executive Summary of the study.

surveyed in the Touche-Ross study. Indeed, they would inevitably be higher because one may not assume gratuitously that religious organizations already have the computer hardware or software needed to operate in a multijurisdictional taxing environment efficiently. This conclusion seems a plausible implication of the finding of the Touche-Ross study that the uncompensated costs of administering sales and use tax are a far higher percent of actual tax paid for small firms grossing less than $10 million in annual sales (hidden costs = 25.1% of sales tax) than these costs are for large firms grossing over $100 million in annual sales (hidden costs = 2.4% of sales tax). *Id.* at 6.

Contrary to the suggestion of the plurality in *Texas Monthly, Inc. v. Bullock,* 109 S. Ct. 890 (1989), these empirical considerations demonstrate that the imposition of sales and use tax collection liability would significantly "inhibit religious activity." 109 S. Ct. at 901. It is, moreover, reasonable to infer from these data that imposition of this form of taxation would have a more detrimental impact on smaller religious bodies, and would favor to that extent larger, more "established" religious bodies, in violation of the equality principle at the core of the nonestablishment principle. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982).

In short, under the free exercise principle the state may not inhibit the direct communication of religious convictions to religious adherents by subjecting them to taxation. But that does not mean that when the state stays the hand of the tax collector in this way it is thereby subsidizing the activities of the church in a manner prohibited by the Establishment Clause. It is merely acknowledging the rightful immunity of the church from the government's pervasive power to regulate and control.

B. The History of Repugnance to Taxes on Knowledge Informs the Current Discussion over Whether A State May Impose Sales Tax on a Religious Body for the Distribution of Religious Literature to its Members Attending a Rally within the Taxing State.

In addition to the reasons offered above for granting a limited immunity from taxation of religious bodies for the transmission of their religious beliefs to their members, amicus suggests the significance of the history of tax resistance in the period of the national founding. Because of its comprehensive scope, taxation is the most significant mechanism of governmental power. It is the predicate for all the others functions of government. For that very reason, the most important tax revolt in this nation's history was joined to ideas of representative democracy in this country's revolution against the British Crown.

The colonists had incorporated into the American experience a variety of practices related to the financial support of established or preferred religious groups. As was noted above, the colonists who began the struggle over religious liberty, principally the Baptists and the Quakers in New England, reacted strongly against these practices. W. McLoughlin, *New England Dissent*, *supra*. The late seventeenth century and early eighteenth century struggle for exemption of dissenting Protestants from taxation to support the established church (Congregational in New England, Episcopal in the southern colonies) turned out to be the seedbed of political revolt against the Crown under the rallying cry, "No taxation without representation." Equally significant was the strong repugnance in the colonial period to "taxes on knowledge." See, e.g., E. & H. Morgan, *The Stamp Act Crisis* (1963). Thus a clear recognition of limits on the taxing power was at the core of the revolutionary spirit that gave birth to this nation.

This Court has repeatedly acknowledged the significance of this history in the resolution of contemporary First Amendment issues. See, e.g., *Grosjean v. American*

Press Co., 297 U.S. 233, 245-248 (1936). Indeed, in the two leading cases most directly on point to this case, the Court made pertinent observations on this very matter. In *Murdock* Justice Douglas wrote: "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed." 319 U.S. at 115. A year later in *Follett*, Justice Douglas again noted:

> "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their callings for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his functions as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw."

321 U.S. at 576-577.

Built into the First Amendment was a history of repugnance to taxes on knowledge in general and to illicit licensing of religious speech in particular. The conclusion is obvious that constitutional limits on taxation were clearly within the intent of the framers of the First Amendment. Since that history is highly relevant to the resolution of this case, that history should inform the current discussion over whether a state may impose sales tax on a religious body for the distribution of religious literature to its members attending a religious worship service.

II. Neither Occasional Religious Rallies within a Taxing State, nor the Use of the Mails by a Religious Body to Distribute Religious Literature to its Religious Adherents Creates Sufficient Nexus to Impose Sales and Use Tax Liability on an Out-of-State Religious Body.

The State Board of Equalization in this case predicated appellee's claim to jurisdiction on the occasional presence of a preacher in California to conduct a religious meeting. For the same reasons offered above in Part I, it is impermissible to base the jurisdiction of the state to tax on an event manifestly involving protected noncommercial, religious speech.

The Commerce Clause and the Due Process Clause preclude a state from exercising jurisdiction over a person outside its borders unless there is sufficient nexus. Hence, even if it were permissible to establish nexus on the basis of the clearly protected activity of preaching, the infrequent visits of the appellant to California are insufficient under the precedents of this Court on nexus. *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). Episodic contacts with a taxing jurisdiction are not enough to establish nexus. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Neither may nexus with California be predicated on the mere use of the federal instrumentality of the mails by a preacher in Louisiana to distribute religious literature to religious adherents in California. *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967).

In *National Geographic, supra*, appellee urged this Court to accept the view that the "*slightest presence*" of a potential taxpayer in a taxing jurisdiction suffices to establish constitutional nexus. Despite the acceptance of that view by the California Supreme Court, 16 Cal. 3d 637 (1976), this Court soundly repudiated that view. Justice Brennan wrote that nexus was established by virtue of the appellant's "*continuous presence* in California in offices that solicit advertising...." 430 U.S. at 562 (emphasis supplied).

Subsequent decisions have reemphasized that nexus

can be established only on a showing of some form of *continuous presence* within the taxing jurisdiction. See, e.g, *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619 (1988) (stores); *Tyler Pipe Industries, Inc. v. Washington Dept. of Rev.*, 107 S. Ct. 2810, 2821-2822 (1987) (permanent sales representative). Amicus urges this Court to adhere to this position, requiring continuous and substantial presence, not mere occasional contacts or the slightest presence of an out-of-state party, in order to establish sufficient nexus with a taxing jurisdiction for purposes of use tax liability.

Because appellee was unable to demonstrate such continuous presence of the appellant in California, it attempted to establish nexus by relying solely on the occasional presence of the preacher in that state to conduct religious crusades. The uncontested and uncontrovertable facts established on this record show that the preacher was not in California at all in 21 of the 28 tax periods at issue in this case.[16] Mr. Swaggart was in California to conduct evangelistic crusades a total of 52 days in 7 years, or an average of a little over 7 days per year. Tr. Exhibit 50. In many of the cities visited by Mr. Swaggart during his occasional visits to California, he stayed for only a single day; only once in seven years did he stay in a city for more than 3 days.[17] To characterize these fleeting and sporadic contacts as "substantial" or "continuous" is to turn on their head the standards that this Court has enunciated for commercial transactions by out-of-state business concerns.

This case, in short, illustrates the very concerns of this Court in *Miller Bros.*, *National Bellas Hess*, and *National Geographic* and their progeny. Even if it were permissible to establish nexus on the basis of the clearly

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16 Under applicable state law in this case, the taxable period is defined as a quarter, not a year. Cal. Rev. & Tax Code §§ 6451-6452, 6455.

17 A typical evangelistic crusade consists of one religious service, generally in the evening, at which the evangelist typically preaches only one sermon.

protected activity of preaching, the *infrequent* visits of the appellant to California are insufficient under the precedents of this Court on nexus. Neither may nexus with California be predicated on the mere use of the federal instrumentality of the *mails* by a preacher in Louisiana to distribute religious literature to religious adherents in California.

III. A Case Focused Primarily on First Amendment Freedoms is an Improper Vehicle to Announce a Shift in the Nexus Requirements Governing the Taxation of Commercial Enterprises that Operate in Interstate Commerce.

The issue of appropriate standards for establishing sufficient nexus over out-of-state commercial enterprises, especially mail-order businesses, is a highly controversial matter that is currently being debated in Congress. The text of the Constitution commits the power to regulate commerce among the several states to the Congress. In the event that Congress enacts legislation that erroneously dilutes the standards on this matter already set down by this Court, it will be time enough to correct those errors in subsequent litigation. It is unnecessary for the Court to enter into this controversy, however unwittingly, at this time. Amicus urges this Court to avoid dicta in this case that may have a major business impact in a completely different context from that envisioned here.

Because appellant is a church engaged in religious ministry, appellant has understandably chosen to present this case to this Court primarily as a case imperiling religious freedom.[18] Appellant has argued in its opening brief that, to avoid the chilling of protected religious ac-

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18 For reasons irrelevant to this brief, the trial court refused to allow the appellant to present its evidence on the nexus issue. Although the record on this issue is not fully developed in this case, the issue appears to have been adequately preserved and has been presented to this Court for its consideration. J.S. App. F3-F4; J.A. 21; Tr. 6-21, 216-225.

tivity, a prophylactic rule is needed that would make it impermissible to use that protected religious activity as the basis for a finding of nexus that would have the direct result of imposing upon the church the significant burden of use tax collection responsibility for all future distribution of religious literature to its members in California. For the reasons set forth in Part I of this brief, amicus supports appellant on that claim.

If this Court does not accept this Religion Clause claim, it by no means follows that the judgment of the court of appeal should be affirmed. Even without a First Amendment overlay on the nexus requirements, under existing precedents it seems clear that appellant should prevail on its nexus claim that it has not had sufficient contacts with California to become subject to its taxing authority.

As was suggested above in Part II, the combined force of *National Geographic*, *National Bellas Hess*, and *Miller Bros.* requires the reversal of the decision below. In *National Geographic*, *supra*, Justice Blackmun intimated that he might be prepared to reconsider the rationale of *Miller Bros.* and *Bellas Hess*. 430 U.S. at 562-563 (Blackmun, J. concurring). There is, however, no good reason to disturb the precedential value of these cases. For example, although *Bellas Hess* was decided over a vigorous dissent, that dissent was itself premised on the view of the record in that case that the out-of-state mail-order house had far greater contacts with Illinois than the majority was willing to acknowledge. 386 U.S. at 761-762 (Fortas, J. dissenting) (seller regularly and continuously engaged in "exploitation of the consumer market" and of the banking and credit facilities of the taxing state). See also *Miller Bros.*, 397 U.S. at 358 (Douglas, J., dissenting) (record viewed as supporting *regular* advertising and delivery within taxing jurisdiction). Far from undermining the sound conclusion reached in *National Geographic* that continuous and substantial presence are required to establish nexus, the dissents in *Miller Bros.* and *Bellas Hess* assume that standard and argue about its application to the facts of those cases.

Since *National Geographic,* moreover, this Court has continued to cite *Bellas Hess* as the governing standard. See, e.g., *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619, 1624 (1988); *Goldberg v. Sweet*, 109 S. Ct. 582, 590 (1989).

In a case so pervaded with sensitive issues arising under the Religion Clause, amicus urges this Court not to break new ground in the complicated area of the requirements under the Commerce Clause and the Due Process Clause for nexus sufficient to trigger taxing jurisdiction over an out-of-state entity. A premature pronouncement on the nexus issue may later be taken to preclude or limit further consideration of that issue. It would not seem to be a wise use of the resources of this Court to announce new rules governing nexus in a case where the record on that matter is undeveloped. Rather, a desire to assure the best possible conditions for thoughtful decision by the Court would suggest that a case with a fuller record would serve as a better vehicle for further elaboration on the nexus requirements. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (Court depends on sharp presentation of issues for illumination of difficult questions); K. Ripple, *Constitutional Litigation* 221-273 (1984). If the nexus issue is deemed central in this case, the judgment below should be reversed and remanded with instructions to develop a full record on the contacts of appellant in California during the relevant taxing periods.

CONCLUSION

For these reasons, the judgment of the Court of Appeal of California should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JIMMY SWAGGART MINISTRIES,

Appellant,

—v.—

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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STATUTES

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STATEMENT OF INTEREST[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan, membership organization dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. Throughout its 70 year history, the ACLU has appeared before this Court in numerous cases involving the Religion Clauses of the First Amendment. Within the past year alone, the ACLU participated, either as direct counsel or as amicus curiae, in Allegheny County v. ACLU of Pittsburgh, ___ U.S. ___, 57 U.S.L.W. 5045 (July 3, 1989); Frazee v. Department of Employment Security, 489 U.S. ___, 109 S.Ct. 1514 (1989), and Texas Monthly v. Bullock, 489 U.S. ___,

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 36.2.

109 S.Ct. 890 (1989). This case raises similar issues about the proper relationship between church and state.

STATEMENT OF FACTS

Appellant, Jimmy Swaggart Ministries, seeks an exemption from California's Sales and Use Tax Law, Cal. Rev. & Tax Code §§6001 et seq., as applied to its retail sales of religious books, records and tapes made in the state of California, or sent by mail to California residents. California taxes all sales of tangible property, without exception. Jimmy Swaggart Ministries is a nonprofit religious corporation. Under protest, appellant paid $183,338.09 in taxes assessed against it by the Board of Equalization of the State of California for the years 1974 through 1981. Following an unsuccessful petition to the Board, appel-

lant brought this lawsuit seeking a refund of the amount paid.

The trial court upheld the assessment after a hearing. The California Court of Appeal affirmed, rejecting appellant's constitutional arguments. 204 Cal.App.3d 151 (1988), as modified, 204 Cal.App.3d 1269 (1988). The Supreme Court of California denied appellant's petition for review, ___ Cal.3d ___ (1988), and this Court noted probable jurisdiction. 109 S.Ct. 1741 (1989).

SUMMARY OF ARGUMENT

Jimmy Swaggart Ministries ("Swaggart Ministries" or "Swaggart") asks this Court to create an unprecedented and unwarranted religious exemption from California's neutral, nondiscriminatory sales tax on the transfer of tangible property, such as tapes, books and record albums. Neither

the free exercise clause nor the establishment clause supports Swaggart's claim.

Specifically, none of the free exercise decisions of this Court, including Murdock v. Pennsylvania, 319 U.S. 105 (1943), support the theory advanced by Swaggart. There simply is no precedent suggesting that a neutral tax on income received in the sale of tangible goods, a tax which is imposed on all sales in California (whether or not made by charitable or religious organizations), is anything other than a valid means of revenue raising by the state. To the contrary, this Court's decisions make clear that the free exercise clause does not exempt religious individuals or organizations from such nondiscriminatory taxes. Hernandez v. Commissioner of Internal Revenue, 109 S.Ct. 2136 (1989). Even in cases where the pay-

ment of a tax is contrary to religious belief, the strong interest of the state in a uniform system of nondiscriminatory taxes has been found to outweigh the resulting burden on religion. United States v. Lee, 455 U.S. 252 (1982).

Moreover, establishment clause concerns dictate that such an exemption would be unconstitutional. Fashioning an exemption for sales made by religious organizations, while all other sales of tangible goods in California are taxed, including those sold by nonreligious charitable and educational organizations, would create an exclusive class of tax beneficiaries based solely on religion. Texas Monthly v. Bullock, 109 S.Ct. 890 (1989). Appellant thus asks this Court to create by judicial fiat an exemption parallel to the one enacted by the Texas legislature and found

violative of the establishment clause in Texas Monthly.

In sum, because the free exercise clause does not support Swaggart's claims, and because establishment clause jurisprudence undermines Swaggart's claims, the decision of the California appellate court should be affirmed.

ARGUMENT

I. THE FREE EXERCISE CLAUSE DOES NOT MANDATE A RELIGIOUS EXEMPTION FROM A NEUTRAL, NONDISCRIMINATORY TAX ON SALES OF TANGIBLE PROPERTY

Swaggart Ministries bases virtually its entire argument on Murdock v. Pennsylvania, 319 U.S. 105 (1943), a case involving a flat license tax on all travelling salespeople. Murdock, however, does not provide the support that appellant is seeking.

In Murdock, Jehovah's Witnesses, who proselytize by travelling door-to-door, talking about their faith and selling religious tracts for a nominal fee or giving them outright to willing listeners, claimed that the license tax burdened their right to exercise their belief. This Court agreed, and held that the tax was unconstitutional.

Contrary to the argument made by Swaggart, the Court did not hold that a tax imposed on income, as opposed to a flat license tax levied on an itinerant evangelist, is a violation of the free exercise clause. In fact, the Court emphasized the difference between a tax imposed on property or income, such as the sales tax at issue here, and the license tax imposed on all door-to-door solicitors at issue in Murdock:

> We have here something quite different . . . from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

319 U.S. at 112. Further, unlike the California sales tax, the license tax in Murdock was "in no way apportioned" to the "realized revenues" of the itinerant preachers forced to pay the tax. Id. at 113-14.

Clearly then, under Murdock, a flat tax levied on an activity which constitutes the exercise of religious belief is unconstitutional. But that is a far cry from holding that a general sales tax applied to realized revenues from the sale of religious literature is unconstitutional. Indeed, last Term, the Court twice considered and rejected free exercise claims

that closely parallel the position of Swaggart Ministries in this case.

In Texas Monthly v. Bullock, 109 S.Ct. 890 (1989), a nonreligious publication brought an establishment clause challenge to a Texas statute that exempted religious periodicals from the state's general sales tax. In defense of its statute, Texas argued, much as appellant has argued here, that failure to provide an exemption would violate the free exercise rights of those who published religious periodicals. This theory was rejected in the plurality opinion written by Justice Brennan. Of particular relevance here, Justice Brennan explained that a tax on income is distinguishable from the occupation tax involved in Murdock:

> The sales tax that Texas imposes is not an occupation tax levied on religious missionaries. Nor is it a flat tax that "restrains in advance," 319

> U.S. at 114, the free exercise of religion. On the contrary, because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications, and in view of its generality it can hardly be viewed as a covert attempt to curtail religious activity.

109 S.Ct. at 904.[2/]

Although finding the question closer than Justice Brennan, the dissent in Texas Monthly also acknowledged that Murdock is "narrowly distinguishable," 109 S.Ct. at 914, from a situation involving sales taxes

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2/ Justice Blackmun's concurrence in Texas Monthly, joined by Justice O'Connor, did not decide the free exercise issue, but did state that the free exercise clause "suggests" that it may not be constitutional to tax the sale of religious books. 109 S.Ct. at 906. However, Justice Blackmun concluded that even if the free exercise clause mandates an exemption for religious publications, the establishment clause dictates that the exemption may not be limited to religious books, but must also be extended to materials devoted to "matters of conscience" in general. Id. Appellant, of course, is seeking precisely the sort of exemption that would be unconstitutional in Justice Blackmun's view.

on religious publications -- precisely the context in which Swaggart Ministries now seeks an exemption by relying invalidly on Murdock as virtually its sole support.

For a variety of reasons, therefore, this case is closer to Texas Monthly than to Murdock. Like the general sales tax involved in Texas Monthly and unlike the license fee involved in Murdock, California's sales tax is not a flat tax; it represents only a small fraction of any sale; it is payable by the buyer, rather than by the religious organization; and it applies to all sales of tangible property made in California. If religious periodicals in Texas do not have a free exercise right to an exemption from the state sales tax, it is difficult to conceive why Swaggart Ministries would have the right to such an exemption on the facts of this case.

Appellant's free exercise claim is also incompatible with this Court's decision last Term in Hernandez v. Commission of Internal Revenue, 109 S.Ct. 2136 (1989). The issue in Hernandez was whether fixed payments made to the Church of Scientology for so-called "training" and "auditing" sessions could be deducted as charitable contributions under the Internal Revenue Code. In ruling that a deduction was unavailable, the Court stressed that the payments at issue "were part of a quintessential quid pro quo exchange: in return for their money, petitioners received an identifiable benefit . . . ." 109 S.Ct. at 2145. The Court also rejected the claim that collecting a neutral tax from Scientology adherents under these circumstances burdens religion in violation of the free exercise clause:

> Any burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent.

Id. at 2149.

Similarly, there is no evidence in the record that collection and payment of the California sales tax challenged by appellant is prohibited by the religious beliefs of the Swaggart Ministries, or that it would inhibit its religious activities in any direct or meaningful way. Rather, the absence of an exemption merely requires Swaggart Ministries to collect the tax from its California purchasers and turn over the money to the state.

Indeed, appellant's free exercise claim would be difficult to sustain even if

the record established a cognizable religious burden, which it does not. As the Court stated in United States v. Lee, 455 U.S. 252, 260 (1982), "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." See also Texas Monthly, 109 S.Ct. at 902 (state interest in collection of sales taxes equals federal interest in collection of social security taxes).

Applying that principle in Lee itself, this Court held that the federal government's interest in uniform collection of social security taxes outweighed the burden placed on Old Order Amish taxpayers, whose religion forbids "both payment and receipt of social security benefits." 455 U.S. at 257.

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

Moreover, "a State's interest in the uniform collection of a sales tax appears comparable to the Federal Government's interest in the uniform collection of Social Security taxes, and mandatory exemptions under the Free Exercise Clause are arguably as difficult to prove." Texas Monthly, 109 S.Ct. at 902.

In short, this Court's recent decisions under the free exercise clause effectively determine the outcome here. As in Hernandez, Lee and Texas Monthly, California's interest in the uniform collection of taxes is high. As in Texas Monthly and Hernandez, appellant does not oppose the

payment of taxes as a matter of religious belief, but rather because of a possible reduction in income due to the marginally increased prices of their products and because of the costs associated with administering the tax.[3/] Unlike Lee, this case involves no direct burden on religious exercise or belief. And, unlike Murdock, California's sales tax does not infringe the right to pursue a given faith by imposing a fee on evangelistic activity.

3/ Collecting and remitting the tax, contrary to Swaggart's arguments, does not constitute the kind of intrusive and inhibiting government oversight that rises to the level of an infringement of religion. See e.g., Hernandez, 109 S.Ct. at 2149; Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)(compliance with administrative requirements of minimum wage and hour laws does not create burden on religious exercise). Nor would compliance with the tax laws create an impermissible entanglement between government and religion, in violation of the establishment clause. See Point IIB, infra.

The free exercise clause, therefore, provides no justification for the exemption claimed by Swaggart Ministries. As Justice Marshall emphasized in Hernandez, the position urged by Swaggart "knows no limitation," and would undermine the integrity of the tax system. 109 S.Ct. at 2149.

II. THE ESTABLISHMENT CLAUSE PROHIBITS A JUDICIALLY-IMPOSED EXEMPTION FOR RELIGIOUS PUBLICATIONS

Not only does the free exercise clause provide no support for the claims made by Swaggart Ministries, but the establishment clause forbids the creation of such a narrow exception to the tax laws.

A. A Tax Benefit Conferred Exclusively Upon Sales Of Religious Publications Violates Establishment Clause Principles

In Texas Monthly, this Court held that a statutory exemption from the Texas state sales tax for religious periodicals violates the establishment clause. Because both the purpose and the primary effect of the exemption was the advancement of religion, the statute violated the first two prongs of the three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), and conveyed a "message of endorsement" of religion. 109 S.Ct. at 896 & n.1, quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

Justice Brennan's plurality opinion in Texas Monthly emphasized that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious

"donors."'" 109 S.Ct. at 899, quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983). See also Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983). When this vicarious support is conferred only upon religion, an unconstitutional endorsement of religion is created in violation of the establishment clause.

Justice Blackmun's concurrence in Texas Monthly, joined by Justice O'Connor, also stressed the fact that the exclusivity of the benefit conferred upon religion under the Texas exemption violated establishment clause principles:

> [B]y confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, see Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic

> understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.

109 S.Ct. at 907 (citations omitted).[4/]

The narrowness of the benefited class distinguished Texas Monthly from earlier cases, such as Walz v. Tax Commission, 397 U.S. 664 (1970). In Walz, this Court upheld New York State's property tax exemption scheme for religious and other nonprofit, educational and charitable organizations. Because the tax benefit was extended to a variety of groups, in addition to religious organizations, the exemption did not violate the establishment clause. 397 U.S. at 673. See also Mueller v. Allen, 463 U.S. 388 (1983)(tuition tax

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4/ See also Allegheny County v. Greater Pittsburgh ACLU, 57 U.S.L.W. 5045 (July 3, 1989). Citing Texas Monthly, the Court stressed that the establishment clause "prohibits the government's support and promotion of religious communications by religious organizations." 57 U.S.L.W. at 5052.

credit that was available to parents who send their children to nonreligious as well as to parochial schools upheld against establishment clause challenge). By contrast, a tax benefit conferred exclusively upon religion violates basic establishment clause values. Yet, that is precisely the sort of exclusive benefit appellant seeks in this case.5/

Recognizing the problematic nature of any claim to exclusive benefits, appellant attempts to argue that the establishment clause entitles Swaggart Ministries to equal treatment at the hands of the state,

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5/ Nor can the exemption proposed by appellant be justified as an "accommodation" of religion. As the Court stated in Allegheny County, an accommodation is valid only when it removes a governmentally imposed burden on religious exercise. 57 U.S.L.W at 5052 n.51. A tax exemption, because it operates as a subsidy of Swaggart's proselytization, would constitute the "kind of government affiliation with particular religious messages that the Establishment Clause precludes." Id.

and that it seeks nothing more. That abstract proposition, however, has little relevance to this case. Indeed, Swaggart's contention that California's neutral tax scheme has a disproportionate impact on certain religions is virtually identical to the argument rejected by this Court in Hernandez:

> It may be that a consequence of [denying the exemption] . . . is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fund-raising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions."

109 S.Ct. at 2147 (citations omitted).[6/]

6/ Both Hernandez and this case are easily distinguishable from this Court's decision in Larson v. Valente, 456 U.S. 228 (1982). In Larson, the Minnesota state legislature enacted a law specifically addressed to religious groups,

(continued...)

California's sales tax satisfies the test proposed by the dissent in Hernandez as well. Justice O'Connor, joined by Justice Scalia, argued that the IRS could not constitutionally tax some fixed payments made to religious organizations for religious services while declaring other, similar payments to be deductible:

> [T]he Government has only two practicable options with regard to distinctively religious [benefits for

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6/ (...continued)
targeting especially those groups that solicit funds in public places. Indeed, there was evidence in the record that the legislation was directed at the "Moonies." 456 U.S. at 254-55. Thus, the Minnesota statute involved the "selective legislative imposition of burdens and advantages upon particular denominations," without secular justification. Id. at 254 (emphasis in original).

In its brief, appellant predicts that California will selectively impose the sales tax only on unpopular denominations, and/or on out-of-state groups. Brief for Appellant at 40. If that were the situation here, this would be a far different case. However, nothing in the opinions below suggests that there is any question of selective prosecution of state laws at issue.

> which a fixed sum is demanded by religious organizations]: to disregard them all, or to tax them all.

109 S.Ct. at 2153 (O'Connor, J., dissenting). Here, California has apparently chosen the path of taxing the sale of all tangible property. That decision lies well within its constitutional authority.

B. Denial Of An Exemption From Sales Taxes Will Not Entangle The State In Religious Affairs

Swaggart Ministries also argues that denial of an exemption will violate the establishment clause by entangling the state in religious affairs. This argument too must fail.

As this Court held in Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-06 (1985), the sort of routine governmental oversight and enforcement necessary to administer fair labor standards or, as in this case, sales taxes, does

not create the pervasive and intrusive involvement that rises to the level of a constitutional violation. As this Court held in Hernandez, the application of neutral tax laws to religious groups does not entangle government impermissibly in religion. 109 S.Ct. at 2147-48.

The mere fact that collecting and remitting the tax will entail some costs for Swaggart Ministries does not enmesh government in religious affairs. The sorts of entangling activities that have been found to violate the establishment clause are far more invasive than the level of contact created by the administration of neutral tax laws. Cf. Aguilar v. Felton, 473 U.S. 402, 414 (1985)(continual and detailed monitoring and contact between state and religious schools violates nonentanglement principle); Larkin v. Grendel's

Den, Inc., 459 U.S. 116 (1982)(delegation of governmental authority to religious body entangles government in religious affairs).

Swaggart also claims that the need to determine what portion of the price paid for religious items was intended to be a donation will impermissibly entangle government in internal religious affairs. This argument, however, was soundly rejected in Hernandez. Thus, even if Swaggart Ministries can demonstrate that some portion of the payments made for religious publications was in fact a donation rather than part of the sale of tangible property, the determination of exactly how much is deductible does not in itself violate the nonentanglement principle.

> [T]he need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems by forcing the government to place a monetary value on a religious

> benefit. In cases where the economic value of a good or service is elusive . . . [the IRS] has often employed . . . an inquiry into the cost (if any) to the donee of providing the good or service . . . . This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involves administrative inquiries that, as a general matter, "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

Hernandez, 109 S.Ct. at 2148 (citations omitted). Neither of Swaggart Ministries' arguments about the allegedly entangling aspects of the sales tax, therefore, has any merit.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE JIMMY SWAGGART MINISTRIES,
Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal of the State of California, Fourth Appellate District, Division One

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION; JOINED BY THE MULTISTATE TAX COMMISSION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the court of appeal's rejection of appellant's Due Process and Commerce Clause arguments rests on an independent and adequate state ground.

2. Whether appellant's systematic and purposeful exploitation of the California market in its mail order business provides an adequate "nexus" to support the imposition of the State's use tax.

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IN THE

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INTEREST OF *AMICI CURIAE*

Amici National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City Management Association are organizations whose members include state, county, and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission is the official administrative agency of the Multistate

Tax Compact. The Compact has been entered into by 18 States and the District of Columbia as full members; 11 additional States have joined the Commission as associate members.[1] The Commission has a vital and continuing interest in tax disputes that may affect the administration of state tax systems.

This case presents a recurring problem: appellant, an out-of-state entity that derives profits from its systematic and purposeful exploitation of an in-state market, is attempting to avoid state taxation by asserting that it lacks a sufficient "nexus" with the taxing State. This issue is of enormous fiscal importance to state and local governments. Entities like appellant draw substantial benefits from the services and infrastructure provided by individual States; unless those entities are made to pay their own way, in-state taxpayers will be forced to shoulder a disproportionate share of the state tax burden. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[2]

STATEMENT

This brief addresses only the first question presented in appellant's brief on the merits (corresponding to the fifth question presented in the jurisdictional statement), which concerns the "nexus" requirement that the Court has derived from the Due Process and Commerce Clauses. The statement of the case therefore is limited to a de-

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[1] The current full members are Alaska, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are Alabama, Arizona, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee. This brief should not be read to reflect the views of any member State that files a separate brief in this case.

[2] The parties' letters of consent pursuant to Rule 36 of the Rules of this Court have been filed with the Clerk of the Court.

scription of evidence and procedural developments that are relevant to the nexus issue. The limited scope of this brief, however, does not reflect disagreement with appellee's position on the merits of the First Amendment question in this case; to the contrary, we associate ourselves with appellee's First Amendment arguments.

1. Appellant is a nonprofit religious organization.[3] During 1974-1981, the tax years at issue here, appellant operated a mail order business from its headquarters in Baton Rouge, mailing religious items—principally books, tapes, and records—to purchasers in (among other places) California. J.S. App. A2-A4. These products were offered for sale through magazines, product catalogs, and special flyers that were sent to individuals in California whose names appeared on appellant's mailing list. J.A. 21, 49-50, 62. The parties stipulated below that appellant's California mail order sales during the period at issue amounted to $1,702,942. J.S. App. 45.

Appellant also had other contacts with California during 1974-1981, although the extent of those contacts is somewhat uncertain because the issue was not the subject of discovery below. It nonetheless is clear that appellant conducted 23 evangelistic "crusades" in California during that period, at which appellant held religious services that involved preaching and singing, and sold various religious and nonreligious items. J.S. App. A3.[4] The "crusades" typically lasted from one to three days,

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[3] During most of the period at issue here appellant was a nonprofit religious corporation. In 1982 the Internal Revenue Service changed appellant's income tax status to that of a church, making the change retroactive to 1980. J.S. App. A2 n.1.

[4] The parties stipulated below that appellant sold $240,560 worth of merchandise at the California crusades. J.S. App. A5. For purposes of its nexus argument appellant does not contest the validity of the imposition of California's sales tax on these transactions (Br. 16), and we therefore confine our discussion to the validity of the use tax associated with appellant's mail order sales.

with one "crusade" lasting six days; over the seven-year period at issue here, appellant conducted 52 days of "crusades" in California. *Ibid.* The crusade activity in California was recorded for later sale or broadcast. *Id.* at A3, A37; J.A. 20. In addition to the actual crusade dates, there was evidence below that appellant's staff spent time in California, where they "made hotel reservations, negotiated and secured leases for crusade meeting places, secured publicity for the meetings, etc." J.A. 20. Similarly, "[s]ome of the time between crusade meeting dates in California included visits with local followers, removal of equipment and facilities, travel to the next location and setting up for the next meeting." *Ibid.*

Appellant also had contacts with California that were unrelated to the "crusades." From 1978 through 1984, a period that includes the last three of the tax years at issue here, appellant maintained a full-time representative in California who counseled adherents and solicited donations. J.S. App. A36; App. Br. 6; J.A. 21, 208. In addition, appellant sold its religious programs to California radio stations and cable television companies for broadcast within the State. J.S. App. A37. Both the "crusades" and appellant's broadcasts were used to further its mail order sales; appellant stipulated below that the availability of mail order products was made known "at evangelistic crusades and over the radio and television in connection with [appellant's] religious broadcasts." J.A. 62. See *id.* at 49-50.

2. California requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail" within the State. Cal. Rev. & Tax Code § 6051 (1975 & Supp. 1989). California also imposes a complementary use tax "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer * * * for storage, use, or other consumption." Cal. Rev. & Tax Code § 6201. The use tax typically is applied in cases where the retail sale took place outside

California and therefore was not itself taxable; while the incidence of the use tax falls on the purchaser (see Cal. Rev. & Tax Code § 6201), the seller in most cases must collect the use tax from the purchaser at the time of sale. Cal. Rev. & Tax Code § 6202, 6203.

During the tax years at issue here appellant neither collected nor paid the use tax on its mail order sales of religious property in California; appellant also failed to pay sales tax on the sale of goods at its California "crusades." In 1981 the California Board of Equalization (the "Board") began an audit of appellant, and the parties eventually stipulated that appellant "'sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California.'" J.S. App. A5. The Board accordingly informed appellant that it owed use and sales taxes of $118,294.54 (of which approximately $104,000 represented use tax on the mail order sales), in addition to interest and penalties. *Ibid.*

After receiving this notification, appellant filed a petition for redetermination, contesting its liability for the use and sales taxes. The petition rested exclusively on First Amendment grounds, contending that imposition of the taxes would "constitute an interference with the 'free exercise' of religion by the Swaggart organization" (J.A. 12; see *id.* at 11-16); appellant's counsel specifically did "not argue nexus" before the Board. J.A. 22. After a hearing, the Board remitted the penalty but otherwise reaffirmed appellant's liability for the tax. J.A. 32-33. Appellant paid the tax and filed a claim for a refund before the Board; the refund claim incorporated by reference appellant's previously filed petition for redetermination and therefore rested entirely on the Free Exercise Clauses of the federal and state Constitutions. J.A. 34. The Board subsequently denied the refund claim. J.A. 35-36.

3. Appellant then brought this action in California superior court. Like its petition for redetermination and claim for refund, appellant's complaint was grounded on the First Amendment and made no mention of nexus (see J.A. 37-41); the parties stipulated before the trial court that the case involved only free exercise issues. J.A. 59. Appellant first raised a Due Process and Commerce Clause nexus claim immediately prior to trial. Supp. C.T. 1-9. The trial court responded with an order *in limine* excluding evidence unrelated to the First Amendment issue (R.T. 12-14), and at the close of trial rejected appellant's request that it reconsider its exclusion of the nexus question. R.T. 229-231. The court ultimately ruled for the Board on the merits of the free exercise claim, noting that it "made its finding solely upon the issue framed by the pleadings as it relates to first amendment grounds." J.A. 213.

The court of appeal affirmed. J.S. App. A1-A40. The court rejected appellant's free exercise arguments (*id.* at A7-A29), as well as state law, Ninth and Tenth Amendment, and evidentiary contentions (*id.* at A33-A35, A37-A40) that are not repeated here. The court also found that its consideration of appellant's Commerce Clause and due process nexus arguments was precluded by appellant's failure to advance those arguments before the Board. Pointing to provisions of state law limiting refund suits to those issues that were first advanced in an administrative claim for refund, the court observed that "[t]he only constitutional ground [appellant] specified [in its refund claim] was the First Amendment; no other constitutional grounds were stated." J.S. App. A32; see *id.* at A30-A31. The court went on to hold alternatively that "[t]he record contains evidence supporting a finding [appellant] had a sufficient nexus to California to justify imposing the use tax" (*id.* at A35; see *id.* at A35-A37), but on rehearing deleted the portion of its opinion addressing the merits of the nexus issue. J.S. App. A41.

The California Supreme Court denied review. J.S. App. A42.

SUMMARY OF ARGUMENT

A. The court of appeal's decision on nexus rests on an independent and adequate state ground. Under California law, taxpayers bringing refund actions in court may advance only those claims that were first specifically presented to the Board. Appellant failed to comply with this requirement. Its administrative refund claim—the document that fixed the scope of its argument—advanced only free exercise contentions. The trial court therefore refused to address appellant's nexus arguments, and the court of appeal expressly grounded its rejection of the those arguments on appellant's procedural default. Because "[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent ground of decision barring review in this Court" (*Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978))—and because the procedural rule involved here serves important state interests—this Court should dismiss for want of jurisdiction the portion of the appeal that advances Commerce Clause and due process arguments.

B. 1. If the Court reaches the merits of the nexus issue, it should reject appellant's arguments. The nexus requirement, which the Court has found in both the Due Process and Commerce Clauses, assures that state taxes bear some relation to the "protection, opportunities and benefits given by the State" (*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)), while guaranteeing that States tax only those transactions with which they have a connection. The Court repeatedly has made clear, however, that there need not be a dollar-for-dollar correspondence between the benefits conferred by the State and the tax imposed on out-of-state commercial entities, and that those benefits need not be directly conferred.

Against this background, appellant is incorrect in asserting that state taxes may be imposed only upon entities that maintain a continuous physical presence in-state. It is sufficient that the taxpayer has projected a substantial economic presence into the State, marked by the purposeful cultivation and exploitation of an in-state market. Whether or not such a taxpayer physically enters the State, its earnings are made possible by the in-state infrastructure and workforce that facilitate advertising, permit the distribution of goods, and allow for the development of a group of willing consumers—all "benefits which [the State] has conferred by the fact of being an orderly, civilized society." *J.C. Penney*, 311 U.S. at 444.

This conclusion draws substantial support from the Court's recent decisions in the closely related area of personal jurisdiction. In that setting, the Court has held that a State does not exceed its powers under the Due Process Clause when it asserts jurisdiction over firms that deliver products into the stream of commerce with the intention that they be purchased by consumers in the forum State. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). California courts thus could assert jurisdiction over appellant if, for example, an in-state purchaser brought suit because he was injured by one of the products that appellant shipped into the State. There is no reason to suppose that the State nevertheless lacks authority to impose a tax on appellant arising out of the same transaction. To the contrary, "[t]he activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945).

2. Viewed against these principles, the record here demonstrates an adequate nexus to support the imposition of California's use tax on appellant. Most obviously, this Court's decisions place it beyond dispute that appel-

lant is subject to tax for the three-year period during which it had a full-time representative in California. See *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). And for the entire period involved here, appellant's projection of its presence into the State by radio and television, by repeated personal visits during "crusades," and by magazine, catalog, and flyer, plainly manifested a purposeful exploitation of the California market. That exploitation was made possible by the infrastructure and services provided by the State. Indeed, even if only physical presence is taken into account, there is adequate nexus here: there is no reason why a tax should be permissible (as it surely is) when a firm maintains a single employee in-state year-round, but not when the firm—as did appellant—periodically sends many employees into the State.

The Court also should reject appellant's argument that the "crusades" cannot be used to support nexus because doing so will discourage protected religious activity. This argument is grounded on two propositions—that the "crusades" are the only element providing nexus here, and that the "crusades" did not generate mail order sales—that are not supported by the record. In any event, California's use tax is not like the flat license fee at issue in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), cited by appellant, which the Court found functioned as a prior restraint on the exercise of religious rights. It is, instead, quite similar to "a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Id.* at 112. Appellant is receiving benefits from the State; like everyone else in society, appellant is simply being asked to pay its own way.

ARGUMENT

APPELLANT'S ARGUMENTS ON "NEXUS" ARE WITHOUT MERIT

A. The State Court's Rejection Of Appellant's "Nexus" Claim Rests On An Independent And Adequate State Ground

It is, of course, black letter law that this Court lacks jurisdiction to "review judgments of state courts that rest on adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983). In particular, "[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). See, *e.g.*, *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Wolfe v. North Carolina*, 364 U.S. 177, 195-196 (1960). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 181-183 (6th ed. 1986). That principle is dispositive here.

California law provides that an administrative claim for a tax refund must "state the specific grounds upon which the claim is founded," and refund suits will be entertained only if "a claim for refund or credit has been duly filed" with the Board. Cal. Rev. & Tax Code §§ 6904(a) (emphasis added), 6932 (1975 & Supp. 1989). Under these provisions, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. * * * The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc. v. State Board of Equalization*, 170 Cal. App. 3d 665, 672 (1985). A taxpayer therefore may not obtain relief on a theory first propounded at trial. See *id.* at 671-672.

Appellant plainly failed to comply with the requirements of California law in advancing its nexus conten-

tions. The document that fixed the scope of appellant's argument, its administrative refund claim, simply incorporated by reference appellant's previously filed petition for redetermination of tax. J.A. 34. The petition for redetermination, in turn, was grounded exclusively on the proposition that taxation would "constitute an interference with the 'free exercise' of religion by the Swaggart organization." J.A. 12; see *id.* at 1-16. The Board's hearing officer thus specifically noted, in forwarding his decision and recommendation to the Board, that appellant's "[c]ounsel does not argue nexus." J.A. 22.[5] Indeed, even after the Board's rejection of the refund claim, appellant's trial court complaint made no mention of nexus in general or of the Commerce or Due Process Clauses in particular (except insofar as the First Amendment is made applicable to the States through the Fourteenth). J.A. 37-41. To the contrary, the parties

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[5] Appellant now asserts that "the State Board of Equalization considered and ruled on the Commerce and Due Process Clause issue." Br. 17 n.12. This is a significant misstatement of the record. The two documents appellant cites in support of its assertion—a letter to appellant from a Board auditor (J.S. App. F3-F4) and the recommendation of a Board hearing officer (J.A. 21)—simply recited a Board counsel's conclusion that there was sufficient nexus to support the imposition of California's use tax. As the court of appeal explained, however, "[t]hese statements say nothing as to whether the issues [of nexus] were disputed; whether [appellant] made any claims on these bases before the Board." J.S. App. A32. In fact, as the court went on to note (*ibid.*), the record makes clear that appellant "d[id] *not* argue nexus" before the Board (J.A. 22 (emphasis added)), and neither the hearing officer's conclusion (see J.A. 22-29) nor the Board's order (J.A. 32-33) addressed the issue. In any event, California law provides that the refund claim is the dispositive document; a taxpayer who fails to advance an issue in its refund claim cannot later rely on materials relating to that issue prepared by the Board for its use in resolving a petition for redetermination. See *Atari*, 170 Cal. 3d at 671-672. And, as we note above, the fact that appellant belatedly attempted to raise the nexus issue at trial and on appeal (see App. Br. 17 n.12) does not excuse its procedural default.

stipulated before the trial court that the claim for a refund was grounded exclusively on the Free Exercise Clauses of the federal and state Constitutions. J.A. 59.

Appellant first raised its nexus claim immediately prior to trial. Supp. C.T. 1-9. The trial court responded with an order *in limine* excluding evidence unrelated to the First Amendment issue, although the court permitted appellant to make offers of proof bearing on the nexus claim. R.T. 12-14. At the close of trial the court rejected appellant's request that it reconsider its exclusion of the nexus issue, noting that appellant's failure to raise the issue until trial deprived the Board of an opportunity to engage in discovery. R.T. 229-231. In ruling for appellee on the merits, the court stated that it "made its finding solely upon the issue framed by the pleadings as it relates to first amendment grounds." J.A. 213.

In affirming, the court of appeal expressly grounded its rejection of the nexus claim on appellant's procedural default, finding it dispositive that the nexus argument was "not raised [by appellant] in its claim for a refund from the Board." J.S. App. A30. Noting the strict procedural requirements of California law (J.S. App. A30-A31, A32), the court held that "[t]he only constitutional ground [appellant] specified [in its refund claim] was the First Amendment; no other constitutional grounds were stated. To adopt [appellant's] position [that its nexus claim was preserved] would require us to rewrite section 6904, replacing its requirement of 'specific grounds,' with a general denial of tax liability standard." J.S. App. A32. This the court "decline[d] to do." *Ibid.* The court went on to find alternatively that there was in fact a sufficient nexus to support the tax (J.S. App. A33, A35-A37), but on rehearing deleted the portion of its opinion addressing the merits of the nexus issue (J.S. App. A41)—making it absolutely clear that its holding involved only state rules of procedure. See *Long*, 463 U.S. at 1041-1042.

Because both decisions below were grounded on state law, the nexus issue is properly before this Court only if the state procedural rule that barred appellant's claim was applied for the purpose of evading resolution of a federal issue, or otherwise fails to advance legitimate state interests. See *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982). But appellant does not (and could not) argue that to be the case. The requirement that taxpayers first present their claims to the Board—which is, after all, an ordinary exhaustion of remedies requirement—is routinely enforced by the California courts. See, *e.g.*, *Atari, Inc. v. Board of Equalization*, *supra*; *Barnes v. Board of Equalization*, 118 Cal. App. 3d 994, 1001 (1981); *American Alliance Insurance Co. v. Board of Equalization*, 134 Cal. App. 3d 601, 609 (1982); *King v. Board of Equalization*, 22 Cal. App. 3d 1006, 1015 (1972). And the rule serves important state concerns. "Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the State Board of Equalization so that the Board may be afforded the opportunity to rectify any mistake in tax collection. * * * Such a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Atari*, 170 Cal. App. 3d at 673. It also, as this case itself makes clear, facilitates a fuller development of the factual record.

Against this background, it is plain that the courts below properly disposed of appellant's nexus contentions on state law grounds. This Court accordingly should dismiss the portion of the appeal advancing Commerce Clause and due process arguments for want of jurisdiction. See, *e.g.*, *Wolfe*, 364 U.S. at 196.

B. There Was Adequate "Nexus" To Support Imposition Of California's Use Tax On Property Sold By Appellant

If the Court nevertheless chooses to reach the Commerce and Due Process Clause issues here, we note, as a preliminary matter, that appellant has framed the

nexus question in a highly misleading manner. Appellant asserts that imposition of the use tax may be grounded, if at all, solely "on the basis of 23 evangelistic crusades appellant conducted in the State during 1974-81." Br. 16 (footnote omitted). In fact, while appellant's failure to raise the nexus issue until trial has left the record in a somewhat murky state—a fact that cuts powerfully against reaching the question now—the record evidence does make clear that appellant's presence in California during the relevant period was considerably more substantial than it now lets on. Any decision on nexus should, of course, take account of the record as a whole. Having said that, however, in our view imposition of the use tax was supportable even on the facts as stated by appellant; in either case, "[t]here is 'nexus' aplenty here." *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624 (1988).

1. This Court has held that States may tax out-of-state entities when there is a "sufficient nexus" between the two—a requirement that assures a fair relationship between "the services provided the out-of-state seller and the taxing State." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555, 558 (1977). The Court has found this requirement in both the Due Process and Commerce Clauses.

The due process nexus requirement, as the Court has explained in describing the closely related due process limit on the assertion of personal jurisdiction, is grounded on the principle that States may not assert authority over out-of-state entities in a manner that "offend[s] 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). In the tax setting, this due process "fair play" principle assures that "the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given

by the State." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). See *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 219-220 (1980); *Mobil Oil Corp. v. Commissioner*, 445 U.S. 426, 436-437 (1980); *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964); *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). The parallel Commerce Clause nexus requirement—the initial prong of the four-part Commerce Clause test first set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977)—is similar to (and in part derived from) the due process nexus limitation [6]; it prevents a multitude of States from impeding interstate commerce by taxing transactions with which they have no substantial connection. See generally *Goldberg v. Sweet*, 109 S.Ct. 582, 589-590 (1989); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 631 (1973).[7]

While a State thus must provide opportunities or benefits to the out-of-state taxpayer, those benefits need not be directly conferred. It is enough that a State "runs mass transit and maintains public roads which benefit

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[6] The *Complete Auto* test evidently was inspired by Justice Rutledge's concurring opinion in *Memphis Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948), which found no threshold impediment to the application of a state tax that was "clearly within the State's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned." See *Complete Auto*, 430 U.S. at 282.

[7] The nexus requirement also is "closely connected" (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981)) to the fourth prong of *Complete Auto*, which assures that the tax is "fairly apportioned" to the taxpayer's in-state activity. 430 U.S. at 287. While the nexus requirement guarantees that the taxpayer has a connection to the taxing State, the fair relation test "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original). See *Goldberg*, 109 S.Ct. at 592.

[the taxpayer's] customers, and supplies a number of other civic services" (*D.H. Holmes*, 108 S.Ct. at 1624), or makes possible " 'the benefit of a trained work force' " (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981) (citation omitted)), or offers the taxpayer the "other advantages of civilized society" (*Goldberg*, 109 S.Ct. at 592); in such cases the tax is adequately "tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." *J.C. Penney*, 311 U.S. at 446. See *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1714-1715 (1989); *Commonwealth Edison*, 453 U.S. at 626.

Indeed, the Court has repeatedly held that there need not be a dollar-for-dollar correspondence between the benefits conferred by the State and the tax imposed on an out-of-state commercial entity:

> [t]he tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. * * * On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' "

Goldberg, 109 S.Ct. at 592 (emphasis in original), quoting *Commonwealth Edison*, 453 U.S. at 627 n.16. See *Cotton Petroleum*, 109 S.Ct. at 1714-1715; *Commonwealth Edison*, 453 U.S. at 623-624, 628-629; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937). By the same token, the Court has rejected the notion "that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State." *National Geographic*, 430 U.S. at 560.

Against this background, appellant plainly is incorrect in asserting (Br. 17) that state taxes may be imposed only upon entities that maintain a continuous physical presence in-state (although such a presence is, of course, enough to establish nexus); the nexus test "cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319. To the contrary, it is sufficient to create nexus that the taxpayer has projected a substantial economic presence into the State, marked by the purposeful cultivation and exploitation of an in-state market. Whether or not such a taxpayer is physically present in the State for all (or, for that matter, for any) of the relevant period, its earnings are made possible by the in-state infrastructure and work force that facilitate advertising, permit the distribution of goods, and allow for the development of a group of willing consumers—all "benefits which [the State] has conferred by the fact of being an orderly, civilized society." *J.C. Penney*, 311 U.S. at 444. At the same time, of course, an entity that "has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment)

Nothing in the policies underlying the Commerce or Due Process Clause nexus requirements suggests that such an entity should be exempt from state taxation. And that is particularly the case when the levy involved is a use tax, for which "[t]he out-of-state seller becomes liable * * * only by failing or refusing to collect the tax from that resident consumer"; "the sole burden imposed upon the out-of-state seller by [a use tax statute] is the administrative one of collecting it." *National Geographic*, 430 U.S. at 558. Such a tax poses "no risk of double

taxation" of the sort that may offend the Commerce Clause, since "[t]he consumer's identification as a resident of the taxing State is self-evident." *Ibid.* And it hardly offends traditional due process notions of fair play to "make the distributor the tax collector for the State" (*General Trading Co. v. Tax Comm'n*, 322 U.S. 335, 338 (1944)) when the seller's intentional projection of its economic presence into the State has given rise to the taxed activity. Indeed, in an electronic age—when radio and television make it possible for an out-of-state entity to maintain a ubiquitous presence in-state, and when sophisticated computer marketing and mailing list techniques allow for systematic exploitation of distant markets—it would be anomalous to hold that commercial entities may escape all taxation by the States from which they draw substantial benefits simply because they do not maintain a continuous physical presence there. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).

This conclusion draws significant support from the Court's decisions in the closely related area of personal jurisdiction. There, the Court has held that a " 'forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Burger King*, 471 U.S. at 473, quoting *World-Wide Volkswagen*, 444 U.S. at 297-298. Thus,

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an in-

> escapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (emphasis in original). See *Asahi Metal Industry*, 480 U.S. at 109-110 (plurality opinion); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment).[8]

Under these precedents, California courts plainly could assert jurisdiction over appellant if, for example, an in-state purchaser brought suit because he was injured by one of the products that appellant had shipped into California. See *Burger King*, 471 U.S. at 473; *World-Wide Volkswagen*, 444 U.S. at 297-298; *McGee*, 355 U.S. at 223. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on appellant arising out of the same transaction. To the contrary, the Court held in the leading case of *International Shoe*—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977))—that due process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The

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[8] The Court in *Asahi Metal Industry* was divided on whether States may assert personal jurisdiction whenever out-of-state sellers are "aware that the final product is being marketed in the forum State" (480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment)), or whether out-of-state sellers must have "an intent or purpose to serve the market in the forum State" (*id.* at 112 (plurality opinion)). There is no need to resolve that issue here, since appellant plainly acted with the purpose of exploiting the California market.

activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *e.g.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic*, 430 U.S. at 561; *Miller Brothers*, 347 U.S. at 345.[9]

2. The principles set out above must be applied to the record here—a record that contains considerably more than the episodic "crusades" discussed by appellant. Not surprisingly, appellant's staff spent more time in California than the actual "crusade" dates: the Board's hearing examiner noted evidence that "an advance promotion staff * * * made hotel reservations, secured publicity for the meetings, etc." J.A. 20. Similarly, "some

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[9] We recognize that the suggestion that nexus may be found in the absence of *any* physical presence by the taxpayer in the taxing State is in some tension with *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967), which found no nexus when the seller's "only connection with customers in the State is by common carrier or the United States mail" (386 U.S. at 758); the Court there observed that the seller had no property within the State. *Id.* at 754-755. But in *National Bellas Hess*, the seller (unlike appellant) did not advertise locally or project its presence into the State through radio or television, conduct that benefits from services provided in-state and that manifests a direct intent to develop a local market. Cf. *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 376 (1941) (imposition of tax on out-of-state taxpayer in part justified by "solicitation through local advertising"). And the Court nowhere suggested in *National Bellas Hess* that *continuous* physical presence was needed in the State to provide nexus; here, appellant was present in California at least episodically, and it generated sales through local television and radio broadcasts. In any event, the decision in *National Bellas Hess* predated the Court's reformulation of Commerce Clause doctrine in *Complete Auto*, as well as its recent elaboration of personal jurisdiction doctrine, and we have some doubt that the specific factual holding of *National Bellas Hess* should survive those decisions.

of the time between crusade meeting dates in California included visits with local followers, removal of equipment and facilities, travel to the next location and setting up for the next meeting." *Ibid.* And the "crusades" themselves were of continuing value to appellant, since California crusade activity was recorded for later broadcast and sale. J.S. App. A37; J.A. 20.

Indeed, even apart from the "crusades," appellant maintained a full-time representative in California to counsel adherents and solicit donations from 1978 through 1984, a period that includes three of the seven tax years at issue here. J.S. App. A36; App. Br. 6; J.A. 21, 208. Appellant also sold religious programs (which advertised the availability of its mail order items) that were broadcast by California radio and television stations. J.S. App. A37; J.A. 49-50, 62. And appellant of course used its mailing list to solicit purchases through magazines, product catalogs, and special flyers. J.A. 21, 49-50, 62.

This is a record that is replete with nexus. Perhaps most obviously, this Court's decisions place it beyond dispute that appellant is subject to tax for the three-year period during which its full-time representative was present in California. It is irrelevant (even if true) that the representative's activities were unrelated to the sale of mail order items. See *National Geographic*, 430 U.S. at 560-561. So long as he enjoyed the benefit of the State's services, as appellant's California representative plainly did, the presence of even a single employee establishes nexus. See *id.* at 557-558; *Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 562 (1975).[10]

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[10] Appellant acknowledges the existence of this full-time employee in California (Br. 6-7 & n.4) but entirely fails to discuss the employee's significance; instead, appellant simply asserts that "[a]t no time did the Board rely on the activities of this religious counselor as a nexus for taxation." Br. 7. Like appellant's assertion that the Board addressed and resolved the nexus issue (see note 5,

And for the entire tax period involved here, petitioner's other contacts with California establish nexus. Appellant's projection of its presence into the State by radio and television (accompanied by solicitations for purchases), along with its solicitations by magazine, catalog, and flyer, plainly manifested a purposeful development and exploitation of the California market. That exploitation was made possible by the infrastructure and services provided by the State: the power system, trained workforce, and police and fire protection necessary for the broadcast of appellant's programs into California homes, as well as the "civilized society" that made possible the distribution of goods to affluent consumers. Against this, appellant's insistence that physical presence is the only relevant criterion relies on an archaic and excessively formal conception of the power to tax. Cf. *International Shoe*, 326 U.S. at 316.

We nevertheless add that, in our view, there is adequate nexus here even if physical presence in the State is the only factor that may be taken into account. While many of this Court's decisions have involved taxpayers with a continuous in-state presence, nothing in those decisions suggests that an uninterrupted presence is a necessary prerequisite for taxation. Surely, for example, an

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supra), this is a substantial misstatement of the record. Again, appellant relies on a letter to appellant from a Board auditor (J.S. App. F3-F4) and the decision and recommendation of the Board hearing officer (J.S. App. 21-22). And again, since nexus was not contested before the Board, neither document purported to settle the relevance of the employee for nexus purposes. Indeed, when appellant finally raised the nexus issue before the state courts, the Board (while insisting that the issue had not been preserved) in fact noted that the employee's presence in California established nexus. See, *e.g.*, Board C.A. Br. 42 n.28. In any event, the issue now, if the Court reaches it, is simply whether the State has the constitutional authority to impose a tax on appellant, which turns on the facts as they actually existed; there is no principle of preclusion that prevents this Court from considering the entire record in addressing the scope of state taxing authority.

adequate nexus exists for the imposition of a use tax when a firm sends into the State a salesperson who, while there, solicits all of the firm's orders from that State—even if the salesperson spends only one day a month (or one day a year) in-state. And, as we note above, the level of state services provided need not precisely match the tax; there is thus no reason why a tax should be permissible (as it surely is) when a firm maintains a single employee in-state year-round, but not when the firm periodically sends many employees into the State—certainly so long as there is a pattern of purposeful, continuing entry into the State. In this case, where appellant conducted 23 "crusades" in California over a seven-year period (along with associated in-state activity), the record plainly "demonstrate[s] 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.'" *National Geographic*, 430 U.S. at 561, quoting *Miller Brothers*, 347 U.S. at 344-345 (emphasis added by the Court).

3. Appellant also makes the additional argument (Br. 18-20) that religious activities—in particular, the "crusades"—cannot supply the nexus that justifies the imposition of California's use tax. This contention is in part identical to appellant's general First Amendment argument, which is beyond the scope of this brief. But insofar as appellant's argument is directed specifically at nexus, it seems to have three parts: (1) that appellant would not be liable for any use tax in the absence of the "crusades"; (2) that the volume of appellant's mail order sales (and thus its use tax liability) is entirely unrelated to the conduct of the "crusades"; and (3) that using the "crusades" as the nexus supporting imposition of use tax liability therefore will discourage the conduct of the "crusades," an effect that is precluded by the First Amendment. In our view, all of these propositions are insupportable.

At the outset, for the reasons set out above, there is nexus aplenty here even apart from the "crusades"; if

the Court accepts our submission on that point, appellant's First Amendment/nexus submission necessarily must fail. As for appellant's second proposition, there is in fact reason to believe that the "crusades" were used to—and did—generate mail order sales. Appellant stipulated below that "[o]ral announcements were * * * made at evangelistic crusades and over the radio and television in connection with [appellant's] religious broadcasts describing the 'tangible personal property' offered for 'sale' by [appellant], the 'prices' or 'donations' required to secure such items and the manner in which they could be obtained." J.A. 62. And while appellant's failure to raise the nexus issue in a timely manner precluded development of an adequate record (by disclosing, for example, whether mail order sales increased during or after "crusades"), appellant's mail order business surely benefitted from the radio, television, and newspaper publicity that accompanied the "crusades." Appellant is thus incorrect in asserting that "the use tax bears no relation whatsoever to the size or frequency of appellant's crusades in California" (Br. 19).

Finally, even if the first two prongs of appellant's argument had substance, the third would be without merit on its own terms. California's use tax plainly is not the equivalent of a fine on the expression of particular religious beliefs, as appellant asserts (Br. 18). And it is not "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights" of the sort at issue in *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). As the Court recently explained, "a flat license or occupation tax poses a greater threat to the free exercise of religion than do [income or property] taxes, because it is 'levied and collected as a condition to the pursuit of activities whose encouragement is guaranteed by the First Amendment' and thus 'restrains in advance those constitutional liberties.'" *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 903 (1989) (plurality opinion), quoting *Murdock*, 319 U.S. at 114. Here, by definition,

the existence of nexus means that the State is providing benefits to appellant; like everyone else in society, appellant is simply being asked to pay its own way.

The tax here thus is quite similar to "a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Murdock*, 319 U.S. at 112. Such taxes, of course, may discourage religious activity; it is possible, for example, that a church might be forced to refuse the gift of a piece of property on which it could have offered religious services so as not to become liable for continuing property tax liability. That prospect, however, does not exempt churches from nondiscriminatory property taxes. The same principle applies here.

Appellant nevertheless argues that applying a tax here would be anomalous because (by appellant's hypothesis) its relatively brief forays into California will subject it to a relatively large use tax liability. The fact remains, however, that the tax here is imposed, not on the "crusades," but on the use of mail order property by California purchasers; appellant must pay the use tax with its own funds only if it refuses to collect the tax from its customers. See *National Geographic*, 430 U.S. at 558. And appellant's sale of property to those purchasers will remain profitable whether or not appellant is liable for the use tax.[11] The use tax is thus not at all

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[11] Appellant observes (Br. 19) that the use tax liability amounts to almost one half the value of the materials sold at the "crusades." That comparison, however, has no significance; the use tax is imposed, of course, not on the "crusade" sales, but on the more than $1.7 million worth of property sold by mail order. Appellant is thus incorrect in suggesting (Br. 19 n.14) that the figures here have any relationship to those in *Murdock*. In that case, as the Court recently noted, the monthly licensing fees at issue likely exceeded the taxpayer's entire monthly income from the distribution of religious material—meaning that the taxpayer there "could not even afford the necessary licenses, let alone support himself once he had met his legal obligation." *Texas Monthly*, 109 S.Ct. at 904

"functionally identical to the flat license fee struck down in *Murdock*," as appellant asserts (Br. 19). See note 11, *supra*. And appellant's suggestion (Br. 20) that California supplied no services that benefitted the "crusades" simply disregards the costs of maintaining roads and providing the general public services that made the "crusades," as well as all of appellant's other in-state activities, possible. In these circumstances, the imposition of use tax liability on appellant was entirely proper.

CONCLUSION

The appeal on the nexus issue should be dismissed. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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n.10 (plurality opinion). There is no danger that the use tax—by definition, a small percentage of the value of the property sold—will impose such a burden on appellant. Indeed, had appellant collected the use tax from its customers, the levy would have imposed *no* direct financial burden on appellant.